TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1939~~ 1940

No. ~~870~~ 43

THE UNITED STATES OF AMERICA, APPELLANT

vs.

WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN, AND JOSEPH AUGUST KLEIN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

FILED APRIL 4, 1940

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THE UNITED STATES OF AMERICA, APPELLANT

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WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN, AND JOSEPH AUGUST KLEIN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

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1 [Citation in usual form showing service on Bryan Purteets filed April 1, 1940, omitted in printing.]

4 In United States District Court for the Eastern District of Missouri, Eastern Division

September Term, A. D. 1939

No. 21231

UNITED STATES OF AMERICA

v.

WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN, AND JOSEPH AUGUST KLEIN

Indictment

Filed Nov. 3, 1939

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

The Grand Jurors of the United States of America, duly empaneled, sworn, and charged in and for the Eastern Judicial District of Missouri, at the September Term thereof, A. D. 1939, and inquiring in and for said District, upon their oaths present and charge as follows:

1. William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein are hereby indicted and made defendants herein.

2. The defendant William L. Hutcheson is a resident of Indiana and is general president of United Brotherhood of Carpenters and Joiners of America.

5 3. The defendant George Casper Ottens is a resident of Illinois and is a general representative of United Brotherhood of Carpenters and Joiners of America.

4. The defendant John A. Callahan is a resident of Missouri and was secretary of Carpenters' District Council of St. Louis until suspended from office on or about August 15, 1939.

5. The defendant Joseph August Klein is a resident of Missouri and is a business representative of Carpenters' District Council of St. Louis.

6. Except as otherwise specified herein the defendants held their respective offices aforesaid at all times during the formation and execution of the combination and conspiracy hereinafter set forth and until the finding of this indictment.

7. At all times during the formation and execution of said combination and conspiracy and until the finding of this indict-

ment, one M. A. Hutcheson and one S. P. Meadows were general vice presidents, and one Frank Duffy was general secretary of United Brotherhood of Carpenters and Joiners of America; one James C. Seymour was secretary of Missouri State Council of Carpenters; and one Walter E. Gebelein was a business representative of Carpenters District Council of St. Louis.

8. United Brotherhood of Carpenters and Joiners of America is a trade union of carpenters and other craftsmen including so-called millwrights, and has its headquarters and general office at Indianapolis, Indiana. Missouri State Council of Carpenters is a state council of United Brotherhood of Carpenters and Joiners of America, and has its headquarters and office at
6 Jefferson City, Missouri. Carpenters' District Council of St. Louis is a district council of United Brotherhood of Carpenters and Joiners of America, comprising and representing nine local unions thereof in and about the City of St. Louis, Missouri, and has its headquarters and office at number 3606 Cozens Avenue, St. Louis, Missouri.

9. International Association of Machinists is a trade union of machinists, having its principal office and headquarters at Washington, District of Columbia. District No. 9 is a district organization of International Association of Machinists, comprising and representing the several local unions thereof in and about the City of St. Louis, Missouri.

10. United Brotherhood of Carpenters and Joiners of America and International Association of Machinists are and have been for many years affiliated with American Federation of Labor, a federation of trade and labor unions, having its principal office at Washington, District of Columbia.

11. Anheuser-Busch, Inc., is a corporation having its principal place of business in the City of St. Louis, Missouri, and branches in seventeen of the other principal cities of the United States. Anheuser-Busch, Inc., is engaged in the business of brewing beer, manufacturing ice-cream cabinets, and producing other articles and commodities of commerce. Anheuser-Busch, Inc., operates and has for many years operated a large brewery and manufacturing plant in the City of St. Louis, Missouri.

12. Anheuser-Busch, Inc., annually purchases and has for many years purchased large quantities of barley and barley malt
7 in the States of California, North Dakota, Oregon, South Dakota, Washington, and Wisconsin, and in other places to the Grand Jurors unknown; and large quantities of rice in the States of Texas, Louisiana, Arkansas, and California, and in other places to the Grand Jurors unknown; and large quantities of hops in the States of California, Washington, and Oregon, in British Columbia, Czechoslovakia, Germany, and Jugoslavia,

and in other places to the Grand Jurors unknown. In the regular course of the business of Anheuser-Busch, Inc., such barley, barley malt, rice, and hops have been and are being continually shipped in interstate or foreign commerce, as the case may be, from the respective places of purchase to the brewery of Anheuser-Busch, Inc., at St. Louis, Missouri, where they are used in the brewing of beer, which is shipped for sale and sold and shipped by Anheuser-Busch, Inc., largely in interstate commerce, to sales agencies of Anheuser-Busch, Inc., and to independent wholesale and retail dealers in each of the States in the United States.

13. Anheuser-Busch, Inc., annually purchases, and has for many years purchased, large quantities of compressor units in the State of Ohio; large quantities of copper tubing in the States of Michigan and Ohio; large quantities of sheet copper and of cork in the State of Pennsylvania; large quantities of Cop-R-Loy tanks in the State of Illinois; and large quantities of valves, of grills, and of wire screens in the State of Michigan. In the regular course of the business of Anheuser-Busch, Inc., such compressor units, copper tubing, sheet copper, cork, Cop-R-Loy tanks, valves, grills, and wire screens have been and are being
8 continually shipped in interstate commerce from the respective places of purchase to the manufacturing plant of Anheuser-Busch, Inc., in the City of St. Louis, Missouri, where they are assembled with other articles and materials to the Grand Jurors unknown and manufactured into ice-cream cabinets which are shipped for sale and sold and shipped by Anheuser-Busch, Inc., largely in interstate commerce to sales agencies and dealers in all of the States of the United States.

14. Borsari Tank Corporation of America is a corporation having its principal place of business in the City and State of New York and is engaged in the business of constructing tank buildings in the States of New York, California, and Missouri, and other states to the Grand Jurors unknown.

15. In the years 1935, 1936, 1937, and 1938 Anheuser-Busch, Inc., anticipated for ensuing years such increases in the demand for its beer as to require expansion of the productive capacity of its St. Louis brewery by construction of additional buildings containing fermentation tanks. In each of those years Borsari Tank Corporation of America constructed such buildings for Anheuser-Busch, Inc., at its St. Louis brewery. In the construction of these buildings Borsari Tank Corporation of America used large quantities of materials shipped directly from places in other states to the brewery of Anheuser-Busch, Inc., in the City of St. Louis, Missouri, including among others the following: Lumber from Oregon, Washington, and Georgia; cement from

Indiana; brass fittings from New York and Wisconsin; structural steel from Illinois; refrigerating equipment from Pennsylvania; tile from Indiana and Illinois; and Ebon, a tank lining material made in Switzerland, from New York. In February 1939 Anheuser-Busch, Inc., anticipated for ensuing years such further increases in the demand for its beer as to require expansion of the productive capacity of its St. Louis brewery by construction of an additional tank building, and accordingly directed Borsari Tank Corporation to submit a proposal therefor. Borsari Tank Corporation of America proceeded to prepare and submit plans, specifications, and a proposal therefor, which Anheuser-Busch, Inc., approved in July 1939. The proposed construction was to cost approximately $500,000 and was to be commenced not later than September 15, 1939. For the proposed construction the specifications required, and Borsari Tank Corporation of America contracted to purchase and intended to have shipped directly to the brewery of Anheuser-Busch, Inc., in the City of St. Louis, Missouri, large quantities of the same materials from the same states as in case of the aforementioned tank buildings.

16. Gaylord Container Corporation is a corporation maintaining its principal place of business in the City of St. Louis, Missouri, and branch offices and plants in the States of Texas, Louisiana, Florida, Georgia, South Carolina, New Jersey, and Wisconsin. Gaylord Container Corporation manufactures paper boxes, cardboard containers, and other articles and commodities of commerce, and makes substantial sales and shipments thereof in interstate commerce. Gaylord Container Corporation leases of Anheuser-Busch, Inc., and occupies land and buildings adjacent to the brewery and manufacturing plant of Anheuser-Busch, Inc., in the City of St. Louis, Missouri.

17. L. O. Stocker Company is a corporation engaged in the business of general building contractor; has its principal place of business in the City of St. Louis, Missouri; and also does business in the States of Oklahoma, Arkansas, Texas, and Illinois.

18. Gaylord Container Corporation made a contract on August 1, 1939, with L. O. Stocker Company to construct for Gaylord Container Corporation at a cost of approximately $70,000 an additional office building on the premises leased by Gaylord Container Corporation from Anheuser-Busch, Inc. For this construction L. O. Stocker Company intended to use and contracted to purchase large quantities of structural steel and other building materials to be shipped directly to the building site in the city of St. Louis, Missouri, from places in the State of Illinois and other states to the Grand Jurors unknown.

19. Beginning so many years ago that the Grand Jurors are unable to fix the date, United Brotherhood of Carpenters and Joiners of America has been engaged, and it is still engaged, in a so-called jurisdictional dispute with International Association of Machinists. The matter in dispute has been and is a claim asserted by United Brotherhood of Carpenters and Joiners of America that millwrights in its membership are entitled to perform the work of erecting and dismantling machinery, to the exclusion of machinists in the membership of International Association of Machinists. United Brotherhood of Car-
11 penters and Joiners of America and its officers have called strikes at divers times and places for the sole purpose of enforcing its said jurisdictional claim as against International Association of Machinists and the members thereof. On October 24, 1932, the defendant William L. Hutcheson, as general president of United Brotherhood of Carpenters and Joiners of America, concluded and signed with A. O. Wharton, as international president of International Association of Machinists, a tentative written understanding between the two unions, to the effect that if any future dispute should arise over work claimed by both unions, which could not be settled locally, there should be no stoppage of work but the dispute should be submitted to the presidents of the two unions for adjustment. To this tentative understanding the two presidents signed and appended addenda wherein they mutually acknowledged the jurisdiction of United Brotherhood of Carpenters and Joiners of America to extend over "line shafting, pulleys and hangers, spouting and chutes, all conveyors, lifts and hoists, except that type of conveyor that is an integral part of the machine * * *;" and the jurisdiction of International Association of Machinists to extend over "the building, assembling, erecting, dismantling, and repairing of machinery in machine shops, buildings, factories, or elsewhere where machinery may be used." By letter dated April 14, 1933, and addressed to William Green, president of American Federation of Labor, the defendant William L. Hutcheson, as general president, and Frank Duffy, as general secretary, of United Brother-
hood of Carpenters and Joiners of America, purported in
12 its name and behalf to cancel and annul the tentative understanding of October 24, 1932. Thenceforth until the finding of this indictment United Brotherhood of Carpenters and Joiners of America has continued its jurisdictional dispute with International Association of Machinists, with the result that further jurisdictional strikes have ensued. Such strikes and disputes have imposed and are imposing a direct, unreasonable burden and restraint upon trade and commerce among the several states.

20. On June 28, 1939, Anheuser-Busch, Inc., had in its employ in its brewery and manufacturing plant in the City of St. Louis, Missouri, approximately two so-called millwrights, approximately sixteen maintenance carpenters, and approximately sixty cabinetmakers, all of whom were members of United Brotherhood of Carpenters and Joiners of America and of local unions comprised in and represented by Carpenters' District Council of St. Louis; and also approximately eighty machinists, all of whom were members of International Association of Machinists and of local unions comprised in and represented by District No. 9. On June 28, 1939, Anheuser-Busch, Inc., had a separate written agreement in force with each of the two unions, prescribing wage rates, hours of labor, and other terms and conditions of employment applicable to such members of the union as might be in the employ of Anheuser-Busch, Inc. The two agreements prescribed identical wage rates and substantially the same hours of labor for the members of both unions.

21. The agreement in force on June 28, 1939, between Anheuser-Busch, Inc., and International Association of Machin-
13 ists and District No. 9, thereof bore no date but was made for the period from April 15, 1938, to April 15, 1939, and had been duly renewed and extended from April 15, 1939, to April 15, 1940. The agreement was the last of a continuous series of like agreements of which the first was made for the period from April 15, 1932, to April 15, 1933. The agreement in force on June 28, 1939, provided that machinists should do "the erecting, assembling, installing, and repairing of all metal machinery or parts thereof." The prior agreements in the series contained provisions to the same effect.

22. The agreement in force on June 28, 1939, between Anheuser-Busch, Inc., and United Brotherhood of Carpenters and Joiners of America and Carpenters' District Council of St. Louis was made and dated March 10, 1938, and was the last of a continuous series of like agreements, of which the first was made and dated October 24, 1933. Each agreement in the series provided that "the work to be done by the members of the Union under this contract shall be as, when, and where determined and designated by the employer." The agreement of March 10, 1938, also provided that any grievances thereunder failing of adjustment by conference between a shop steward of the union and the foreman or the employer should be submitted to arbitration, and that no employee should strike because of any grievance while the same remained undisposed of in the manner thus provided.

23. On divers occasions between October 24, 1933, and the finding of this indictment the defendants, Joseph August
14 Klein, John A. Callahan, and George C. Ottens, purport-

ing to represent the Carpenters' District Council of St. Louis and United Brotherhood of Carpenters and Joiners of America, made demands upon Anheuser-Busch, Inc., to employ millwrights who were members of United Brotherhood of Carpenters and Joiners of America, instead of machinists, to perform various parts and all of the work of erecting, assembling, installing, and setting machinery in the St. Louis brewery and manufacturing plant of Anheuser-Busch, Inc. These demands did not in any way relate to the wage rates, hours of labor, or working conditions applicable to members of United Brotherhood of Carpenters and Joiner of America in the employ of Anheuser-Busch, Inc., but involved only the claim that millwrights who were members of United Brotherhood of Carpenters and Joiners of America had exclusive jurisdiction over and the exclusive right to perform the work of erecting, assembling, installing, and setting machinery.

24. Within three years next before the finding of this indictment, and within this Eastern Division of the Eastern District of Missouri, the defendants William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein, together with Walter E. Gebelein, James C. Seymour, S. P. Meadows, M. A. Hutcheson, and other co-conspirators whose names are to the Grand Jurors unknown, have knowingly, wilfully and unlawfully engaged in a combination and conspiracy in restraint of trade and commerce among the several states in violation of Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful re-
15 straints and monopolies" (26 Stat. 209), commonly known as the Sherman Antitrust Act; and especially in restraint of the flow into the State of Missouri from other states of materials used and intended to be used by Anheuser-Busch, Inc., for the brewing of beer and for the manufacture of ice-cream cabinets, and by Borsari Tank Corporation of America for the construction of tank buildings for Anheuser-Busch, Inc., and by L. O. Stocker Company for the construction of an additional office building for Gaylord Container Corporation; and also in restraint of the flow from the State of Missouri to other states of beer brewed by Anheuser-Busch, Inc., and of ice-cream cabinets manufactured by Anheuser-Busch, Inc.; and generally in restraint of the interstate trade and commerce of Anheuser-Busch, Inc., of Borsari Tank Corporation of America, of Gaylord Container Corporation, and of L. O. Stocker Company; and it was part of said combination and conspiracy that said restraints should be and were effected for an unlawful and

wrongful purpose by strikes, picketing, boycotts, and other means and methods, all of which are hereinafter more fully set forth.

25. On divers occasions beginning as early as the year 1937, the exact dates being to the Grand Jurors unknown, the defendants herein and their co-conspirators aforesaid did communicate with one another and did meet and confer together in the City of St. Louis, Missouri, and in other places to the Grand Jurors unknown, and through said communications and conferences did form and continue until the finding of this indictment their said unlawful combination and conspiracy in restraint of trade
16 and commerce among the several states, which took effect in great part in the City of St. Louis, Missouri, as hereinafter more fully appears.

26. At all times during the formation and execution of their said combination and conspiracy the said defendants and their co-conspirators well knew that Anheuser-Busch, Inc., had had agreements continuously since the year 1932 with International Association of Machinists and District No. 9 thereof to employ members thereof to do the erecting, assembling, installing, and repairing of all metal machinery; and they well knew that Anheuser-Busch, Inc., had had agreements continuously since October 24, 1933, with United Brotherhood of Carpenters and Joiners of America and Carpenters' District Council of St. Louis that the work to be done by members thereof in the employ of Anheuser-Busch, Inc., should and would be as, when, and where determined and designated by Anheuser-Busch, Inc.; and after March 10, 1938, they well knew that the agreement of March 10, 1938, between Anheuser-Busch, Inc., and United Brotherhood of Carpenters and Joiners of America and Carpenters' District Council of St. Louis provided for arbitration of all grievances arising thereunder and prohibited all strikes on account of such grievances pending arbitration thereof.

27. Throughout the formation and execution of their said combination and conspiracy neither the defendants herein nor their coconspirators aforesaid were employees of Anheuser-Busch, Inc.; and no dispute existed between Anheuser-Busch, Inc., and the millwrights, carpenters, and cabinetmakers in its employ concerning the terms and conditions of their employ-
17 ment or concerning any other legitimate objects for which such employees might organize and strike against their employer.

28. The defendants herein and their coconspirators aforesaid entered into said combination and conspiracy for the unlawful object and purpose of inducing and coercing Anheuser-Busch, Inc., to violate its said agreements with International Association

of Machinists and District No. 9 thereof, and to employ millwrights of United Brotherhood of Carpenters and Joiners of America, instead of machinists, to perform the work of erecting, assembling, installing, and setting all machinery. As part of their said combination and conspiracy, and in order to accomplish their said unlawful object and purpose, the defendants and their coconspirators determined and agreed among themselves by concerted use of their power and influence as officers respectively of United Brotherhood of Carpenters and Joiners of America, Missouri State Council of Carpenters, and Carpenters' District Council of St. Louis, to threaten, order, instigate, and promote strikes, picketing, boycotts, and other restraints of commerce among the several states, as hereinafter more fully set forth, without warrant or justification in law.

29. On and shortly before June 28, 1939, pursuant to said combination and conspiracy and in furtherance thereof, the defendants George Casper Ottens, John A. Callahan, and Joseph August Klein, by direction and with approval of the defendant William L. Hutcheson, communicated an ultimatum to Anheuser-Busch, Inc., in the City of St. Louis, Missouri, that unless An-
18 heuser-Busch, Inc., would agree by five o'clock P. M., on June 28, 1939, to employ millwrights of United Brotherhood of Carpenters and Joiners of America exclusively for the work of erecting, assembling, installing, and setting machinery in the St. Louis brewery and manufacturing plant of Anheuser-Busch, Inc., then the said defendants would call a strike of said millwrights, carpenters, and cabinetmakers and would instigate a sympathy strike of all members of other unions affiliated with American Federation of Labor in the employ of Anheuser-Busch, Inc., and would prevent all members of United Brotherhood of Carpenters and Joiners of America and of other building trades unions affiliated with American Federation of Labor from working upon any construction being performed and about to be performed for Anheuser-Busch, Inc., by independent contractors, including the construction of the proposed tank building about to be performed by Borsari Tank Corporation of America.

30. Pursuant to said combination and conspiracy and in furtherance thereof, the defendants, well knowing that the said agreement of March 10, 1938, between Anheuser-Busch, Inc., and United Brotherhood of Carpenters and Joiners of America and Carpenters' District Council of St. Louis provided that all grievances thereunder must be submitted to arbitration, did unlawfully neglect and refuse to submit to arbitration the demand asserted in their said ultimatum, although often requested to arbitrate the same by Anheuser-Busch, Inc., and representatives

of International Association of Machinists and District No. 9 thereof.

31. Pursuant to said combination and conspiracy, and in furtherance thereof, the defendants George Casper Ottens, John A. Callahan, and Joseph August Klein, by direction and with approval of the defendant William L. Hutcheson, on June 28, 1939, in the City of St. Louis, Missouri, called a strike of the millwrights, carpenters, and cabinetmakers and attempted to instigate sympathy strikes of members of other unions, in the employ of Anheuser-Busch, Inc., and caused the premises of Anheuser-Busch, Inc., in the City of St. Louis, Missouri, and also the adjoining premises of Gaylord Container Corporation, to be picketed by persons bearing umbrellas and charging Anheuser-Busch, Inc., to be unfair to organized labor; all with intent to shut down the brewery and manufacturing plant of Anheuser-Busch, Inc., to hinder and prevent the passage of persons and property to and from said premises, and thus to restrain and stop the commerce of Anheuser-Busch, Inc., described in paragraphs 12 and 13 hereof, and to restrain the commerce of Gaylord Container Corporation, described in paragraph 16 hereof.

32. Pursuant to said combination and conspiracy, and in furtherance thereof, the said defendants and their coconspirators aforesaid also instigated, promoted, and brought about a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States, by distributing printed circulars and sending letters to local unions, councils, and individual members of United Brotherhood of Carpenters and Joiners of America and of other trade and labor unions affiliated with American Federation of Labor and to members of the public at large in many of the states, and by publishing notices in "The Carpenter," an official periodical publication of United Brotherhood of Carpenters and Joiners of America, circulated in all of the states of the United States, denouncing Anheuser-Busch, Inc., as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer, all with the intent and effect of restraining and stopping the commerce therein, described in paragraph 12 hereof.

33. Pursuant to said combination and conspiracy, and in furtherance thereof, the said defendants and their coconspirators aforesaid also refused to permit members of United Brotherhood of Carpenters and Joiners of America to be employed, and prevented such members from being employed, by Borsari Tank Corporation of America, with the intent and effect of preventing construction of the tank building about to be built by Borsari Tank Corporation of America for Anheuser-Busch, Inc., as de-

scribed in paragraph 15 hereof, and thus of restraining the commerce of Anheuser-Busch, Inc., in beer, described in paragraph 12 hereof; and also with knowledge and willful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used by Borsari Tank Corporation of America for the construction of said tank building, as described in paragraph 15 hereof, and of the commerce of Borsari Tank Corporation of America in general.

34. Pursuant to said combination and conspiracy, and in furtherance thereof, the said defendants and their coconspirators aforesaid also refused to permit members of United Brotherhood of Carpenters and Joiners of America to be employed, and
21 prevented such members from being employed, by L. O. Stocker Company, with the intent and effect thereby of preventing the performance of its contract with Gaylord Container Corporation for the construction of an additional office building for Gaylord Container Corporation, as described in paragraph 18 hereof; and also with knowledge and willful disregard of the consequent restraint of the commerce of Gaylord Container Corporation, described in paragraph 16 hereof, and the consequent restraint and stoppage of commerce in the materials intended to be used by L. O. Stocker Company for the construction of said additional office building, as described in paragraph 18 hereof, and of the commerce of L. O. Stocker Company in general.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants herein and their coconspirators aforementioned, throughout the period aforesaid, at the places and in the manner and form aforesaid, knowingly, willfully, and unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce among the several states of the United States of America, with the intent and effect of restraining such commerce in the commodities and materials aforementioned and of imposing a direct and unreasonable burden thereon; that the said combination and conspiracy was formed, and each of the acts of the said defendants and their coconspirators in furtherance thereof was committed, not to obtain higher wages, shorters hours of labor, or any other legitimate object of a labor union, but only with the unlawful and wrongful object and purpose of inducing and coercing an
22 employer to violate a contract with one group of employees and to replace them with another group; and that the said combination and conspiracy, and each of the acts of the said defendants and their coconspirators aforementioned in furtherance thereof, has been in and of itself unwarranted, unreasonable, and

oppressive, and against the peace and dignity of the United States of America, and contrary to the form of the statutes of the United States in such case made and provided.

ROSCOE T. STEFFEN,
WILLIAM M. MARVEL,
PAUL V. FORD,
Special Assistants to the Attorney General.

A true bill:
EDWARD T. NOLAND,
Foreman.

(File endorsement omitted.)

23 In United States District Court

Stipulation re filing of pleas and motions, etc.

Filed December 16, 1939

It is hereby stipulated and agreed by and between the attorneys for the Government and the attorneys for the defendants in the above entitled cause that all pleas and motions of all the defendants in this cause shall be filed with the District Clerk of the Eastern Division of the Eastern Judicial District of Missouri not later than Monday, January 15, 1940.

It is further stipulated and agreed by and between the attorneys for the Government and the attorneys for the defendants that argument on such pleas and motions as might be filed shall be had on February 16, 1940, the docket permitting. Should the docket not permit, it is further stipulated and agreed by the parties hereto that the Court shall be requested to hear said arguments on Friday, March 1, 1940.

ROSCOE T. STEFFEN,
Special Assistant to the Attorney General.
CHARLES H. TUTTLE,
J. O. CARSON,
Attorney for the Defendants.
MUNRO ROBERTS & BRYAN PURTEET,
Attorney for the Defendants.
By BRYAN PURTEET.

24 In United States District Court

Order as to filing of pleas and motions

Filed December 16, 1939

To the CLERK OF THE SAID COURT:

It is hereby ordered that Monday, January 15, 1940, shall be the last date for the filing of any pleas and motions by the defendants, in the cause of the United States vs. Hutcheson, et al.

And the attorneys for the defendants are hereby directed to file such pleas and motions as they desire not later than Monday, January 15, 1940.

(Signed) CHARLES B. DAVIS,
Judge, U. S. District Court.

Dated December 16, 1939.

25 In United States District Court

Appearances of counsel

December 21, 1939

Entry of appearance of Charles H. Tuttle, Esq., of the New York Bar; J. O. Carson, Esq., of the Indiana Bar; and Messrs. Grimm, Mueller & Roberts, Munro Roberts, and Bryan Purteet, Esq., as attorneys for defendants William L. Hutcheson, George Casper Ottens, John A. Calahan, and Joseph August Klein, filed.

26 In United States District Court

Separate demurrer of defendant William L. Hutcheson

Filed January 10, 1940

Comes now William L. Hutcheson, by his attorneys, and having heard the said indictment read says that the said indictment and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient at law, and that he, the said William L. Hutcheson, is not bound by the law of the land to answer the same and this he is ready to verify.

Defendant says that no crime against the laws of the United States is charged in the said indictment against this defendant.

The alleged indictment does not show facts sufficient to bring the same within the provisions of any statute of the United States of America.

The said indictment does not plead or allege any facts which constitute an offense against the laws of the United States.

The indictment as a whole alleges no facts nor acts which would constitute a violation of the laws of the United States.

27 The acts complained of therein do not in any manner violate Section 1 of Title 15 of the United States Code, popularly known as the Sherman Anti-Trust Act.

CHARLES H. TUTTLE.
Charles H. Tuttle.
MUNRO ROBERTS.
Munro Roberts.
J. O. CARSON, SR.
J. O. Carson, Sr.
BRYAN PURTEET,
Bryan Purteet,
705 Olive St., St. Louis, Missouri.

28 In United States District Court

Separate demurrer of defendant George Casper Ottens

Filed January 10, 1940

Comes now George Casper Ottens, by his attorneys, and having heard the said indictment read says that the said indictment and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient at law, and that he, the said George Casper Ottens, is not bound by the law of the land to answer the same and this he is ready to verify.

Defendant says that no crime against the laws of the United States is charged in the said indictment against this defendant.

The alleged indictment does not show facts sufficient to bring the same within the provisions of any statute of the United States of America.

The said indictment does not plead or allege any facts which constitute an offense against the laws of the United States.

29 The indictment as a whole alleges no facts nor acts which would constitute a violation of the laws of the United States.

The acts complained of therein do not in any manner violate Section 1 of Title 15 of the United States Code, popularly known as the Sherman Anti-Trust Act.

CHARLES H. TUTTLE.
Charles H. Tuttle.
MUNRO ROBERTS.
Munro Roberts.
J. O. CARSON.
J. O. Carson, Sr.
BRYAN PURTEET,
Bryan Purteet,
705 Olive St., St. Louis, Missouri.

30 In United States District Court

Separate demurrer of defendant John A. Callahan

Filed January 10, 1940

Comes now John A. Callahan, by his attorneys, and having heard the said indictment read says that the said indictment and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient at law, and that he, the said John A. Callahan, is not bound by the law of the land to answer the same and this he is ready to verify.

Defendant says that no crime against the laws of the United States is charged in the said indictment against this defendant.

The alleged indictment does not show facts sufficient to bring the same within the provisions of any statute of the United States of America.

The said indictment does not plead or allege any facts which constitute an offense against the laws of the United States.

The indictment as a whole alleges no facts nor acts which would constitute a violation of the laws of the United States.

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CHARLES H. TUTTLE.
Charles H. Tuttle.
MUNRO ROBERTS.
Munro Roberts.
J. O. CARSON, Sr.
J. O. Carson, Sr.
BRYAN PURTEET,
Bryan Purteet,
705 Olive St., St. Louis, Missouri.

32 In United States District Court

Separate demurrer of defendant Joseph August Klein

Filed January 10, 1940

Comes now Joseph August Klein, by his attorneys, and having heard the said indictment read says that the said indictment and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient at law, and that he, the said Joseph August Klein, is not bound by the law of the land to answer the same and this he is ready to verify.

Defendant says that no crime against the laws of the United States is charged in the said indictment against this indictment.

The alleged indictment does not show facts sufficient to bring the same within the provisions of any statute of the United States of America.

The said indictment does not plead or allege any facts which constitute an offense against the laws of the United States.

The indictment as a whole alleges no facts nor acts which would constitute a violation of the laws of the United States.

33 The acts complained of therein do not in any manner violate Section 1 of Title 15 of the United States Code, popularly known as the Sherman Anti-Trust Act.

CHARLES H. TUTTLE,
Charles H. Tuttle,
MUNRO ROBERTS,
Munro Roberts,
J. O. CARSON, Sr.,
J. O. Carson, Sr.,
BRYAN PURTEET,
Bryan Purteet,
705 Olive St., St. Louis, Missouri.

34 In United States District Court

Order for hearing

Filed January 19, 1940

Separate demurrers to the indictment in the above entitled case having been filed by counsel for each of the defendants and defense counsel having stipulated with the Attorneys for the United States that argument on said demurrers should be heard by this Court on February 16, 1940, the docket permitting, it is

therefore ordered by this Court on motion of the Attorneys for the United States that argument of said demurrers to the indictment in the above entitled case shall be heard on February 16, 1940.

(Signed) CHARLES B. DAVIS,
Judge—U. S. District Court.

35 In United States District Court

Record entry showing separate demurrers of defendants argued and submitted on briefs, etc.

February 16, 1940

This day comes the United States of America, appearing by Roscoe T. Steffen, Special Assistant to the Attorney General, and comes also the defendants, appearing in their own proper persons and by attorneys; and the separate demurrers of defendants, heretofore filed herein, to the indictment in this cause now coming on to be heard, and argued before and submitted to the Court on briefs to be hereafter presented.

36 In United States District Court

Memorandum of the court

(Filed March 29, 1940)

Four officers of the United Brotherhood of Carpenters and Joiners of America are indicted under the Sherman Anti-Trust Act, 15 U. S. C. A. 1, and are alleged to have conspired to restrain interstate commerce. The acts set out in the indictment were the outcome of a jurisdictional dispute at Anheuser-Busch, Inc., between defendants' union, which is affiliated with the American Federation of Labor, and the International Association of Machinists, also affiliated with the A. F. L. Defendants contended their members should be exclusively entitled to perform the work of erecting, repairing, and dismantling machinery that was being done by the Machinists.

The indictment alleges that defendants picketed or caused to be picketed the premises of Anheuser-Busch, Inc., and the premises of its tenant, Gaylord Container Corporation, the
37 latter adjoining the premises of Anheuser-Busch, Inc.; that defendants refused to allow their members to be employed by Borsari Tank Corporation of America, which was about to construct a tank building for Anheuser-Busch, Inc.; that defendants refused to allow their members to be employed by L. O.

Stocker Company, which had a contract to build an office building for Gaylord Container Company; and that defendants distributed circulars and letters and caused notices to be printed throughout the country in "The Carpenter", the official publication of defendants' union, denouncing Anheuser-Busch, Inc., as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking beer brewed by that company.

Restraint of interstate commerce is alleged to have been attempted (1) through the publication of such circulars and notices throughout the country, intended to prevent the transportation of beer from Missouri to other states; (2) through what is alleged to be a "boycott" of the Borsari Company, which was prevented from shipping materials into Missouri from other states for the construction of the tank building; (3) through what is alleged to be a "boycott" of the Stocker Company, which was prevented from shipping materials into Missouri from other states for the construction of the office building for the Gaylord Container Corporation; and (4) through the picketing of the Anheuser-Busch plant and the premises of Gaylord Container Corporation, which was intended to cut off the manufacture and consequent shipping of beer and other products in interstate commerce by those companies.

Defendants have filed separate demurrers, which have been argued and briefed and are now for determination.

38 The definition of an unlawful conspiracy under the Sherman Act is given in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465:

"The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means."

This concept of a conspiracy, so far as this case is concerned, has been qualified by certain statutes.

The Clayton Act, 15 U. S. C. A. 17, provides that a labor organization, or the members thereof, shall not be held or construed to be an illegal combination or conspiracy in restraint of trade, under the anti trust laws.

The Norris-LaGuardia Act, 29 U. S. C. A. 105, prohibits any Court from issuing an injunction upon the ground that any person or persons participating in a labor dispute are engaged in an unlawful combination or conspiracy, because of the doing of certain acts.

In order to charge the defendants with the commission of a crime under the Sherman Act, the indictment must not only

allege sufficient facts to show a conspiracy to cause a direct restraint upon interstate commerce, as distinguished from a remote or incidental restraint (Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 37, 79 L. Ed. 1570; Levering & Garrigues Company v. Morrin, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062), but must also show that defendants' activities were unlawful, outside the scope of the legitimate objects and means that may be sought and employed by labor unions under the sanction of the Clayton Act (Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. Ed. 349).

39 Allegations in the indictment concerning the activities of defendants in picketing the premises of Anheuser-Busch, Inc., and Gaylord Container Corporation, as well as the refusal to allow their members to be employed by Borsari Tank Corporation and L. O. Stocker Company, fail to allege a conspiracy to directly restrain interstate commerce; the restraint on commerce shown by such allegations is only incidental. Levering & Garrigues Company v. Morrin, supra; United Leather Workers v. Herkert & Meisel, 265 U. S. 457; Industrial Association v. United States, 268 U. S. 64; United Mine Workers v. Coronado Coal Co., 259 U. S. 344; Leader v. Apex Hosiery Company (C. C. A., 3rd, 1939), 108 Fed. (2d) 71.

The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy. The Congress has not declared that a dispute of the nature alleged is unlawful. By the indictment it is sought to punish the defendants for what is conceived to be an unwarranted interference with a local industry, under the pretense that by the dispute interstate commerce was restrained. As the Supreme Court has said in Levering & Garrigues Company v. Morrin, supra, l. c. 107:

"Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. Use of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce which gives character to the conspiracy."

40 Allegations pertaining to the publication throughout the country of notices in which a boycott of Anheuser-Busch

beer was requested, however, set forth an attempt to interfere with the interstate commerce in that product. It therefore becomes necessary to determine whether defendants employed any unlawful means or attempted an unlawful purpose in their latter activities.

The means used by defendants are not shown to be unlawful. Publication of notices that Anheuser-Busch was unfair to organized labor and requests to withdraw patronage from the products of that company was a direct boycott, lawfully carried out. No secondary boycott of customers purchasing the company's products is disclosed.

The Government contends, however, that the purpose behind defendants' acts was unlawful; and that a "jurisdictional strike" cannot be justified, however lawful the means. Counsel for the Government concede that jurisdictional strikes are permitted in some states, although a few states have outlawed them, generally by legislation.

Whatever rule may be adopted in the various states, labor unions engaging in jurisdictional strikes are immune from suit in the federal courts, so long as lawful means are employed, under the provisions of the Norris-LaGuardia Act of 1932, enlarging the scope of section 20 of the Clayton Act. New Negro Alliance v. Sanitary Grocery Company, 303 U. S. 552; Lauf v. E. G. Schinner & Company, 303 U. S. 323; Blankenship v. Kurfman (C. C. A. 7th, 1938), 96 Fed. (2d) 450; Terrio v. S. N. Nielsen Construction Company (D. C. La., 1939), 30 Fed. Supp. 77.

That the jurisdictional strike in the present case grows out of a "labor dispute" within the meaning of the Norris-La-
41 Guardia Act is shown by section 13 of the Act (29 U. S. C. A., sec. 113). In New Negro Alliance v. Sanitary Grocery Company, supra, the Act was held to cover a dispute between an organization interested in procuring employment for members of its race and an employer. As in the case under consideration, defendants' attempt was to require one class of persons to be employed in place of the class then employed. The Supreme Court found that the purpose of the Norris-LaGuardia Act is to legalize and sanction the use of peaceful persuasion in "labor disputes" within the terms of the Act (l. c. 562):

"The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act (referring to the *Duplex* case, supra, among others). *It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute*

concerning 'terms and conditions of employment' in an industry or a plant or a place of business *should be lawful;* that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices." [Italics supplied.]

In Duplex Printing Press Company v. Deering, supra, the Supreme Court had held that section 20 of the Clayton Act was intended to place certain restrictions upon the general operation of the anti-trust laws, as well as to restrict the right to injunctions. At that time the section was interpreted to apply only to disputes involving employers, employees, and persons seeking employment, and immunity was not extended to labor organizations or individuals not parties to the dispute. By the passage of the Norris-LaGuardia Act, such restriction in the scope of the Clayton Act is no longer in force (New Negro Alliance
42 v. Sanitary Grocery Company, supra), and protection is now extended to persons and organizations not immediate parties to the dispute.

The Court in the Duplex case stated at p. 471:

"Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, *and upon the general operation of the Anti-Trust Laws*— a restriction in the nature of a special immunity to a particular class, with corresponding detriment to the general public * * *." [Italics supplied.]

The decision of the District Court for the District of Columbia on March 26, 1940, in United States v. Drivers, Chauffeurs and Helpers Local Union No. 639, etc. (not yet reported), cannot be regarded as a precedent in this case. That action was under another section of the Sherman Act, the question of interstate commerce was not involved and the indictment alleged the use by defendants of threats, force, and violence, all of which are unlawful acts.

This is alleged to be a criminal case. The indictment should set forth facts which if proved would constitute a crime. That this indictment does not do. The tendency of legislation has been to countenance conduct such as that set out in the indictment, by providing that it does not give rise to even a civil action. This policy of the law inheres in all the relations between em-

ployer and employee. That which does not amount to a civil wrong can hardly be characterized as criminal.

The separate demurrers are sustained.

(Signed) CHARLES B. DAVIS,
United States District Judge.

43 In United States District Court

Order dismissing indictment

Filed April 1, 1940

Pursuant to opinion and judgment of this Court filed on March 29, 1940, sustaining separate demurrers and special pleas in bar to the indictment in the above entitled case, it is hereby ordered and adjudged that the indictment be this day dismissed as to all defendants.

(Signed) CHARLES B. DAVIS,
Judge, U. S. District Court.

Dated this 1 day of April 1940.

44 In United States District Court

Petition for appeal

Filed April 1, 1940

Comes now the United States of America, plaintiff herein, and states that on the 29th day of March 1940, demurrers and special pleas in bar interposed by the defendants William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein to the indictment herein were by the Court sustained, and the plaintiff being aggrieved at the ruling of said District Court in sustaining said demurrers and special pleas in bar to the indictment, prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said Judgment and Order sustaining said demurrers and special pleas in bar to said indictment, and that a transcript of the record in this cause duly authenticated by the Clerk of this Court be sent forthwith to the Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

(Signed) ROSCOE T. STEFFEN,
Roscoe T. Steffen,
Special Assistant to the Attorney General.

Dated April 1st, 1940.

45 In United States District Court

Assignment of errors

Filed April 1, 1940

Now comes the United States of America, having heretofore filed its petition for appeal herein, and says that as a result of the action taken by this Court in sustaining the separate demurrers and special pleas in bar filed against the indictment in this cause by the defendants William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein and in entering judgment thereon in favor of the said defendants on said demurrers and special pleas in bar, there has intervened manifest and prejudicial error to the prejudice of the United States of America in the above-entitled cause. The said errors so intervening are enumerated as follows, to wit:

1. The Court committed material error against the United States of America in sustaining the said demurrers and special pleas in bar of the said defendants.

2. The Court committed material error against the United States in dismissing the indictment.

3. The Court committed material error against the United States by failing to overrule the said demurrers and special pleas in bar.

4. The Court committed material error against the United States in sustaining the said demurrers and special pleas in bar on the ground that the activities of the defendants, described in the indictment, in picketing the premises of Anheuser-

46 Busch, Inc., and of Gaylord Container Corporation with the intent and effect of preventing the said Anheuser-Busch, Inc., and of Gaylord Container Corporation from engaging in interstate commerce did not constitute a violation of the Sherman Act, c. 647, 26 Stat. 209; U. S. C., Tit. 15, Sec. 1.

5. The Court committed material error against the United States in sustaining the said demurrers and special pleas in bar on the ground that the activities of the defendants, described in the indictment, in refusing to permit members of the United Brotherhood of Carpenters and Joiners of America to work for L. O. Stocker Company with the intent and effect of preventing the transportation of building materials in interstate commerce into the State of Missouri by the said L. O. Stocker Company did not constitute a violation of Section 1 of the Sherman Act (c. 647, 26 Stat. 209; U. S. C., Tit. 15, Sec. 1).

6. The Court committed material error against the United States in sustaining the several demurrers and special pleas in

bar on the ground that the activities of the defendants, described in the indictment, in refusing to permit members of the United Brotherhood of Carpenters and Joiners of America to work for the Borsari Tank Corporation of America with the intent and effect of preventing the said Borsari Tank Corporation of America from transporting building materials in interstate commerce into the State of Missouri did not constitute a violation of Section 1 of the Sherman Act (c. 647, 26 Stat. 209; U. S. C., Tit. 15, Sec. 1).

7. The Court committed material error against the United States in sustaining the said several demurrers and special pleas in bar on the ground that the activities of the defendants, described in the indictment, in refusing to permit members of the United Brotherhood of Carpenters and Joiners of America to work for the Borsari Tank Corporation of America or the L. O. Stocker Company with the intent of restraining the Interstate commerce carried on by the said Anheuser-Busch, Inc., and
47 the said Gaylord Tank Corporation did not constitute a violation of Section 1 of the Sherman Act (c. 647, 26 Stat. 209; U. S. C., Title 15, Sec. 1).

8. The Court committed material error against the United States in sustaining the said demurrers and special pleas in bar on the ground that the activities of the defendants, described in the indictment, in conducting a systematic and nation-wide boycott of beer brewed by the said Anheuser-Busch, Inc., and of dealers in said beer with the intent and effect of restraining interstate commerce in the said beer, did not constitute a violation of Section 1 of the Sherman Act (c. 647, 26 Stat. 209; U. S. C., Tit. 15, Sec. 1).

9. The Court committed material error against the United States in sustaining the said several demurrers and special pleas in bar on the ground that because of the Norris-LaGuardia Act, c. 90, 47 Stat. 70; U. S. C., Tit. 29, Secs. 101–115, the activities of the defendants, described in the indictment, in conducting a systematic and nation-wide boycott of beer brewed by said Anheuser-Busch, Inc. and of dealers in said beer with the intent and effect of restraining interstate commerce in the said beer did not violate Section 1 of the Sherman Act (c. 647, 26 Stat. 209, U. S. C., Tit. 15, Sec. 1).

10. The Court committed material error against the United States in sustaining the said demurrers and special pleas in bar on the ground that the indictment does not charge the defendants with a conspiracy to directly restrain interstate commerce in violation of Section 1 of the Sherman Act (c. 647, 26 Stat. 209, U. S. C., Tit. 15, Sec. 1), as properly construed.

11. The Court committed material error against the United States in sustaining the said demurrers and special pleas in bar on the ground that under Section 1 of the Sherman Act (c. 647, 26 Stat. 209, U. S. C., Tit. 15, Sec. 1), when construed in
48 the light of Section 6 of the Clayton Act (38 Stat. 731, Tit. 15, U. S. C., Sec. 17), and the Norris-LaGuardia Act (c. 90, 47 Stat. 70, U. S. C., Tit. 29, Secs. 101–115), the activities of the defendants described in the indictment were not carried on by illegal means and methods and were not intended to accomplish an unlawful purpose.

Wherefore, the United States of America respectfully prays that the action taken by said Court in sustaining the said demurrers and special pleas filed by the defendants and the ruling of the Court in entering judgment in favor of the defendants on said demurrers and special pleas be set aside and held for naught.

Respectfully submitted.

ROSCOE T. STEFFEN,
Roscoe T. Steffen,
Special Assistant to the Attorney General.

49 In United States District Court

Order allowing appeal to the Supreme Court of the United States

Filed April 1, 1940

This cause having come on this day before the Court on the petition of the United States of America, petitioner herein, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the Order and Judgment herein dismissing the indictment as to all defendants and sustaining the demurrers and special pleas in bar interposed by the defendants William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein to the indictment in said cause, and that a duly certified copy of the record of said cause be transmitted forthwith to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said petition, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is therefore, by the Court,

Ordered and adjudged that the United States of America be and it is hereby allowed an appeal from the Order and Judgment of this Court sustaining the demurrers and special pleas in bar of the defendants to the indictment and dismissing the indict-

ment as to all defendants, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted forthwith to the Clerk of the Supreme Court and that a citation be issued as provided by law.

50 It is further ordered that the United States be and it is hereby permitted a period of twenty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

(Signed) CHARLES B. DAVIS,
District Judge.

Dated April 1, 1940.

51 In United States District Court

[Title omitted.]

Defendants' motion to amend orders of court

Filed April 16, 1940

Come now the defendants, by their attorneys, and inform the Court that there appears in the Court's order of April 1, 1940, sustaining separate demurrers, among other things the following:

"Pursuant to opinion and order of this Court on March 29, 1940, sustaining separate demurrers and special pleas in bar * * *"

And there appeared in the order allowing appeal to the Supreme Court of the United States, filed April 1, 1940, the following:

"Ordered and Adjudged that the United States of America be and it is hereby allowed to appeal from the order and judgment of this Court sustaining the demurrers and special pleas in bar of the defendants to the indictment and dismissing the indictment as to all defendants."

Defendants say that there were no special pleas in bar filed in this case by any of the defendants and that therefore the foregoing phraseology is misleading and creates the inference

52 that the Court sustained special pleas in bar, when in truth and in fact there were no special pleas in bar in the case and consequently the Court did not sustain any special pleas in bar.

Wherefore, defendants pray that the Court amend its orders by striking out therefrom all reference to "and special pleas in bar."

BRYAN PURTEET,
Attorneys for Defendants.

Receipt of above motion to amend received this 16th day of April 1940, 2:10 P. M.

ROSCOE T. STEFFEN,
Attorney for the United States.

[File endorsement omitted.]

53 In United States District Court

[Title omitted.]

Order amending orders of Court

Filed April 16, 1940

The appellees-defendants herein having moved the Court to amend its order of April 1, 1940, sustaining separate demurrers to indictment and its order of April 1, 1940 allowing appeal, by striking out therefrom all reference to the words "and special pleas in bar," and the Court having duly considered the same

Doth find that no special pleas in bar were filed in this case except as the four papers denoted as separate demurrers of defendants may be so construed, and further declares that the Court made no ruling on whether such documents should be so construed, or not.

Wherefore, it is ordered, adjudged, and decreed that the foregoing orders be and they are hereby amended to eliminate any reference or mention of "special pleas in bar."

And it is further ordered that the Clerk prepare and transmit to the Supreme Court of the United States an additional or supplemental transcript showing appellees-defendants motion to amend and this order of the Court.

(Signed) CHARLES B. DAVIS,
Judge.

Dated 4–16–1940.

[File endorsement omitted.]

54 In United States District Court

Praecipe for transcript of record

Filed April 3, 1940

To the CLERK,
United States District Court,
Eastern District of Missouri, Eastern Division:

The appellant hereby directs that in preparing the Transcript of the Record in the above entitled cause for its appeal to the Supreme Court of the United States you include the following:

1. Docket entries and minute entries showing return of indictment, filing of demurrers and entry of Order and Judgment sustaining demurrers.
2. Indictment.
3. Stipulation.
4. Order for filing motions.
5. Order setting date of argument.
6. Demurrers.
7. Opinion.
8. Order and Judgment sustaining demurrers.
9. Petition for Appeal to the Supreme Court of the United States.
10. Statement of Jurisdiction of the Supreme Court of the United States.
11. Assignment of Errors.
12. Order Allowing Appeal.
13. Proof of Service on Appellees of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Statement as to Jurisdiction.
14. Citation.
15. Praecipe.

(S.) ROSCOE T. STEFFEN,
Roscoe T. Steffen,
Special Assistant to the Attorney General.

Dated April 3rd, 1940.
Service acknowledged.

(S.) BRYAN PURTEET,
Counsel for Defendants.

Dated April 3rd, 1940.

55 [Clerk's Certificate to foregoing transcript omitted in printing.]

57 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed April 19, 1940

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

FRANCIS BIDDLE,
Solicitor General.

Service of the foregoing Statement of Points and Designation of Record to be Printed is hereby acknowledged this 9th day of April 1940.

CHARLES H. TUTTLE,
Counsel for Appellees.

[File endorsement omitted.]

[Endorsement on cover:] File No. 44277. E. Missouri, D. C. U. S. Term No. 870. The United States of America, Appellant vs. William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein. Filed April 4, 1940. Term No. 870 O. T. 1939.

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FILE COPY

No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM L. HUTCHESON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 870

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM L. HUTCHESON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT OF JURISDICTION

(Filed April 1, 1940)

In compliance with Rule 12 of the rules of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction upon appeal to review the judgment entered in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Title 18, U. S. C. Sec. 682, Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended, otherwise known as the Criminal Appeals Act, and by title 28, U. S. C. Sec. 345.

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B. The statute of the United States, the construction of which is involved herein, is Section 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C. Title 15, Sec. 1). The pertinent provisions of Section 1 of the Sherman Act follow:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

C. The judgment of the District Court sought to be reviewed was entered on March 29, 1940, and a petition for appeal was filed on April 1, 1940, and is presented to the District Court herewith to wit on this first day of April 1940.

The indictment in this case is based on Section 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C. Title 15, Section 1). The indictment charges that the defendants, officers of the United Brotherhood of Carpenters and Joiners of America conspired together and with others (a) to restrain the flow into the State of Missouri from other states of materials used and intended

to be used by Anheuser-Busch, Inc., for the brewing of beer and for the manufacture of ice-cream cabinets and by Borsari Tank Corporation of America for the construction of tank buildings for Anheuser-Busch, Inc., and by L. O. Stocker Company for the construction of an additional office building for Gaylord Container Corporation; (b) to restrain the flow from the State of Missouri to other states of beer brewed by Anheuser-Busch, Inc., and of ice-cream cabinets manufactured by Anheuser-Busch, Inc.; and (c) to restrain generally the interstate trade and commerce of Anheuser-Busch, Inc., of Borsari Tank Corporation of America, of Gaylord Container Corporation, and of L. O. Stocker Company. The indictment also charges that it was a part of the combination and conspiracy that the restraints should be and were effected for an unlawful and wrongful purpose by strikes, picketing, boycotts, and by other means and methods set forth in the indictment.

The indictment further charges that the defendants entered into the conspiracy for the unlawful purpose and object of inducing and coercing Anheuser-Busch, Inc., to violate its agreements with another labor union, the International Association of Machinists, and to compel it to employ members of the United Brotherhood of Carpenters and Joiners to perform the work of erecting and installing all machinery. It is charged that pursuant to the conspiracy the defendants threatened

to call sympathetic strikes of all members of any unions affiliated with the American Federation of Labor in the employ of Anheuser-Busch, Inc.; that the defendants unlawfully refused to submit to arbitration in accordance with prior agreements with Anheuser-Busch, Inc., and the International Association of Machinists the question of which union should have jurisdiction over workers engaged in erecting and installing the machinery for Anheuser-Busch, Inc.; and that defendants instigated a strike of and picketing by all members of the United Brotherhood of Carpenters and Joiners employed by Anheuser-Busch, Inc.

It is further charged in the indictment that defendants employed unlawful methods to attain their objects and purposes and sought by bringing pressure upon third persons having economic dealings with Anheuser-Busch, Inc., to force Anheuser-Busch, Inc., to grant their unlawful demands. In particular, defendants are charged with refusing to permit members of the United Brotherhood of Carpenters and Joiners of America to work for Borsari Tank Corporation of America, an independent contractor engaged to construct a tank building for Anheuser-Busch, Inc.; with refusing to permit members of the United Brotherhood of Carpenters and Joiners of America to work for L. O. Stocker Company, an independent contractor engaged by Gaylord Container Corporation (a lessee from Anheuser-Busch, Inc.) to construct an

additional office building; and with conducting a systematic and nation-wide boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer with the intent and effect of restraining interstate commerce in the said beer.

Separate demurrers were interposed by each of the defendants and were sustained by the District Court by its order and judgment. The court dismissed the indictment on the grounds that the picketing and strikes alleged did not directly restrain interstate commerce and that the purposes and objects of defendants and the boycott and other means by which defendants sought to attain them as alleged in the indictment did not constitute an offense under Section 1 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. Sec. 1) for the reason that labor unions are immune from prosecution for such activities under the provisions of Section 6 of the Clayton Act (15 U. S. C. Sec. 17), and the Norris-La Guardia Act, c. 90, 47 Stat. 70, U. S. C. Title 29, Sec. 101–115.

The following decisions sustain the jurisdiction of the Supreme Court upon appeal to review the judgment in this cause on the ground that the said judgment is based upon the construction of the statute upon which the indictment is found:

United States. v. *The Borden Company,* et al, 308 U. S. —, 60 S. Ct. 182.
United States v. *Patten,* 226 U. S. 525.
United States v. *Hastings,* 296 U. S. 188.
United States v. *Kapp,* 302 U. S. 214.

It may also be suggested that the jurisdiction of the Supreme Court may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, when the defendants have not been put in jeopardy. See: *United States* v. *Celestine,* 217 U. S. 278; *United States* v. *Barber,* 219 U. S. 72; *United States* v. *Oppenheimer,* 242 U. S. 85; *United States* v. *Thompson,* 251 U. S. 407; *United States* v. *Goldman,* 277 U. S. 229.

The decision of the District Court, insofar as it holds that because the defendants are officials of a labor union their activities are not subject to prosecution under the Sherman Act, is contrary to the decisions of the Supreme Court of the United States in *Bedford Co.* v. *Stone Cutters' Assn.,* 274 U. S. 37; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Duplex Co.* v. *Deering,* 254 U. S. 443; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Local 167* v. *United States,* 291 U. S. 293; and in *United States* v. *Painters District Council No. 14,* 284 U. S. 582.

Insofar as the court below held that the activities of the defendants charged in the indictment did not directly restrain interstate commerce in violation of the Sherman Act, its decision is contrary to the decision of the Supreme Court of the United States in *Bedford Co.* v. *Stone Cutters' Assn.,* 274 U. S. 37; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Currin* v. *Wallace,* 306

U. S. 1; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Local 167* v. *United States,* 291 U. S. 293; *United States* v. *Brims,* 272 U. S. 549; *United States* v. *Painters District Council No. 14,* 284 U. S. 582; *Mulford* v. *Smith,* 307 U. S. 38; and *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1.

Appended hereto is a copy of the opinion of the court filed March 29, 1940.

Respectfully submitted. Francis Biddle Solicitor General.

ROSCOE T. STEFFEN,
Special Assistant to the Attorney General.

Francis Biddle,
Solicitor General

MEMORANDUM OF THE COURT

(Filed March 29, 1940)

Four officers of the United Brotherhood of Carpenters and Joiners of America are indicted under the Sherman Anti-Trust Act, 15 U. S. C. A. 1, and are alleged to have conspired to restrain interstate commerce. The acts set out in the indictment were the outcome of a jurisdictional dispute at Anheuser-Busch, Inc., between defendants' union, which is affiliated with the American Federation of Labor, and the International Association of Machinists, also affiliated with the A. F. L. Defendants contended their members should be exclusively entitled to perform the work of erecting, repairing, and dismantling machinery that was being done by the machinists.

The indictment alleges that defendants picketed or caused to be picketed the premises of Anheuser-Busch, Inc., and the premises of its tenant, Gaylord Container Corporation, the latter adjoining the premises of Anheuser-Busch, Inc.; that defendants refused to allow their members to be employed by Borsari Tank Corporation of America, which was about to construct a tank building for Anheuser-Busch, Inc.; that defendants refused to allow their members to be employed by L. O. Stocker Company, which had a contract to build an office building for

Gaylord Container Company; and that defendants distributed circulars and letters and caused notices to be printed throughout the country in The Carpenter, the official publication of defendants' union, denouncing Anheuser-Busch, Inc., as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking beer brewed by that company.

Restraint of interstate commerce is alleged to have been attempted (1) through the publication of such circulars and notices throughout the country, intended to prevent the transportation of beer from Missouri to other states; (2) through what is alleged to be a "boycott" of the Borsari Company, which was prevented from shipping materials into Missouri from other states for the construction of the tank building; (3) through what is alleged to be a "boycott" of the Stocker Company, which was prevented from shipping materials into Missouri from other states for the construction of the office building for the Gaylord Container Corporation; and (4) through the picketing of the Anheuser-Busch plant and the premises of Gaylord Container Corporation, which was intended to cut off the manufacture and consequent shipping of beer and other products in interstate commerce by those companies.

Defendants have filed separate demurrers, which have been argued and briefed and are now for determination.

The definition of an unlawful conspiracy under the Sherman Act is given in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 465:

> The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.

This concept of a conspiracy, so far as this case is concerned, has been qualified by certain statutes. The Clayton Act, 15 U. S. C. A. 17, provides that a labor organization, or the members thereof, shall not be held or construed to be an illegal combination or conspiracy in restraint of trade, under the antitrust laws.

The Norris-La Guardia Act, 29 U. S. C. A. 105, prohibits any Court from issuing an injunction upon the ground that any person or persons participating in a labor dispute are engaged in an unlawful combination or conspiracy, because of the doing of certain acts.

In order to charge the defendants with the commission of a crime under the Sherman Act, the indictment must not only allege sufficient facts to show a conspiracy to cause a direct restraint upon interstate commerce, as distinguished from a remote or incidental restraint (*Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 55 S. Ct. 37, 79 L. Ed. 1570; *Levering & Garrigues Company* v. *Morrin,* 289 U. S. 103, 53 S. Ct. 549,

77 L. Ed. 1062), but must also show that defendants' activities were unlawful, outside the scope of the legitimate objects and means that may be sought and employed by labor unions under the sanction of the Clayton Act (*Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349).

Allegations in the indictment concerning the activities of defendants in picketing the premises of Anheuser-Busch, Inc., and Gaylord Container Corporation, as well as the refusal to allow their members to be employed by Borsari Tank Corporation and L. O. Stocker Company, fail to allege a conspiracy to directly restrain interstate commerce; the restraint on commerce shown by such allegations is only incidental. *Levering & Garrigues Company* v. *Morrin,* supra; *United Leather Workers* v. *Herkert & Meisel,* 265 U. S. 457; *Industrial Association* v. *United States,* 268 U. S. 64; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Leader* v. *Apex Hosiery Company* (C. C. A., 3rd, 1939), 108 Fed. (2d) 71.

The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy. The Congress has not declared that a dispute of the nature alleged is unlawful. By the indictment it is sought to punish the defendants for what is conceived to be an unwarranted interference with a local industry, under the pretense that by the dispute interstate commerce was restrained. As the

Supreme Court has said in *Levering & Garrigues Company* v. *Morrin, supra,* l. c. 107:

> Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce which gives character to the conspiracy.

Allegations pertaining to the publication throughout the country of notices in which a boycott of Anheuser-Busch beer was requested, however, set forth an attempt to interfere with the interstate commerce in that product. It therefore becomes necessary to determine whether defendants employed any unlawful means or attempted an unlawful purpose in their latter activities.

The means used by defendants are not shown to be unlawful. Publication of notices that Anheuser-Busch was unfair to organized labor and requests to withdraw patronage from the products of that company was a direct boycott, lawfully

carried out. No secondary boycott of customers purchasing the company's products is disclosed.

The Government contends, however, that the purpose behind defendants' acts was unlawful; and that a "jurisdictional strike" cannot be justified, however lawful the means. Counsel for the Government concede that jurisdictional strikes are permitted in some states, although a few states have outlawed them, generally by legislation.

Whatever rule may be adopted in the various states, labor unions engaging in jurisdictional strikes are immune from suit in the federal courts, so long as lawful means are employed, under the provisions of the Norris-LaGuardia Act of 1932, enlarging the scope of section 20 of the Clayton Act. *New Negro Alliance* v. *Sanitary Grocery Company,* 303 U. S. 552; *Lauf* v. *E. G. Schinner & Company,* 303 U. S. 323; *Blankenship* v. *Kurfman* (C. C. A. 7th, 1938), 96 Fed. (2d) 450; *Terrio* v. *S. N. Nielsen Construction Company* (D. C. La., 1939), 30 Fed. Supp. 77.

That the jurisdictional strike in the present case grows out of a "labor dispute" within the meaning of the Norris-LaGuardia Act, is shown by section 13 of the Act (29 U. S. C. A., sec. 113). I *New Negro Alliance* v. *Sanitary Grocery Company, supra,* the Act was held to cover a dispute between an organization interested in procuring employment for members of its race, and an employer. As in the case under consideration, defendants'

attempt was to require one class of persons to be employed in place of the class then employed. The Supreme Court found that the purpose of the Norris-LaGuardia Act is to legalize and sanction the use of peaceful persuasion in "labor disputes" within the the terms of the Act (l. c. 562):

> The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act (referring to the *Duplex* case, supra, among others). *It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute* concerning "terms and conditions of employment" in an industry or a plant or a place of business *should be lawful;* that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices. [Italics supplied.]

In *Duplex Printing Press Company* v. *Deering, supra,* the Supreme Court had held that section 20 of the Clayton Act was intended to place certain

restrictions upon the general operation of the anti-trust laws, as well as to restrict the right to injunctions. At that time the section was interpreted to apply only to disputes involving employers, employees, and persons seeking employment, and immunity was not extended to labor organizations or individuals not parties to the dispute. By the passage of the Norris-LaGuardia Act, such restriction in the scope of the Clayton Act is no longer in force (*New Negro Alliance* v. *Sanitary Grocery Company, supra*), and protection is now extended to persons and organizations not immediate parties to the dispute.

The Court in the *Duplex* case stated at p. 471:

> Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, *and upon the general operation of the Anti-Trust Laws*—a restriction in the nature of a special immunity to a particular class, with corresponding detriment to the general public * * *." [Italics supplied.]

The decision of the District Court for the District of Columbia on March 26, 1940, in *United States* v. *Drivers, Chauffeurs and Helpers Local Union No. 639, etc.* (not yet reported), cannot be regarded as a precedent in this case. That action was under another section of the Sherman Act, the

question of interstate commerce was not involved, and the indictment alleged the use by defendants of threats, force and violence, all of which are unlawful acts.

This is alleged to be a criminal case. The indictment should set forth facts which if proved would constitute a crime. That this indictment does not do. The tendency of legislation has been to countenance conduct such as that set out in the indictment, by providing that it does not give rise to even a civil action. This policy of the law inheres in all the relations between employer and employee. That which does not amount to a civil wrong can hardly be characterized as criminal.

The separate demurrers are sustained.

(Signed) CHARLES B. DAVIS,
United States District Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 43

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM L. HUTCHESON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 17–22) is reported in 32 F. Supp. 600.

JURISDICTION

The order of the court below dismissing the indictment was entered on April 1, 1940 (R. 22). On the same day an order allowing appeal was entered (R. 25–26). On April 29, 1940, this Court noted probable jurisdiction. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended, 18 U. S. C.,

§ 682, otherwise known as the Criminal Appeals Act, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statute primarily involved is Section 1 of the Sherman Act, as amended (c. 647, 26 Stat. 209, 15 U. S. C., § 1), which is printed in the Appendix, *infra,* pp. 66–67. In construing the Sherman Act the court below also considered Sections 6 and 20 of the Clayton Act, as amended (c. 323, 38 Stat. 730, 15 U. S. C., §§ 17, 31), and the Norris-La-Guardia Act (c. 90, 47 Stat. 70, 29 U. S. C., §§ 101–115). These statutory provisions are also set forth in the Appendix, *infra,* pp. 67–72.

QUESTION PRESENTED

Whether the acts charged in the indictment are violations of Section 1 of the Sherman Act.

STATEMENT

On November 3, 1939, the appellees (hereinafter referred to as "the defendants") were indicted in the United States District Court for the Eastern District of Missouri, Eastern Division (R. 1–12), for having combined and conspired to restrain interstate commerce in violation of Section 1 of the Sherman Act. The defendants filed separate demurrers to the indictment (R. 13–16), which were sustained by the District Court on March 29, 1940 (R. 17).

A. THE ALLEGATIONS OF THE INDICTMENT

The pertinent allegations of the indictment are summarized below:

Description of the defendants and of the organizations with which they are affiliated.—The defendants are William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein. William L. Hutcheson is general president of the United Brotherhood of Carpenters and Joiners of America (hereinafter referred to as "the Brotherhood of Carpenters"), a trade-union of carpenters and other craftsmen, including millwrights. George Casper Ottens is a general representative of the United Brotherhood of Carpenters. John A. Callahan was, until about August 15, 1939, secretary of the Carpenters District Council of St. Louis, which represented nine local unions of the Brotherhood of Carpenters in that area. Joseph August Klein was the business representative of the Carpenters District Council. (R. 1.)

Description of the trade and commerce involved.—The defendants are charged with having restrained interstate trade and commerce carried on by Anheuser-Busch, Inc., Borsari Tank Corporation, The Gaylord Container Corporation, and L. O. Stocker Company.

Anheuser-Busch, Inc., operates a large brewery and manufacturing plant in St. Louis, Missouri. In order to manufacture beer in St. Louis it purchases and causes to be shipped in interstate com-

merce barley and barley malt, rice, and hops from other states. The beer so manufactured is shipped by Anheuser-Busch in interstate commerce all over the United States. (R. 2–3.)

In addition to the grains which are made into beer, Anheuser-Busch annually purchases large quantities of copper tubing, sheet copper, compressor units, cork, tanks, valves, grills, and wire screens in states other than Missouri. These commodities are shipped in interstate commerce to the Anheuser-Busch plant in St. Louis where they are used with other materials to manufacture ice-cream cabinets which Anheuser-Busch ships in interstate commerce to every state in the union. (R. 3.)

Each year, from 1935 to 1938, Anheuser-Busch has expanded its productive capacity by constructing additional buildings in St. Louis containing fermentation tanks. Each of these buildings was built for Anheuser-Busch by Borsari Tank Corporation, an independent corporation specializing in tank-building construction. In the construction of these tank buildings, the Borsari Tank Corporation used large quantities of building materials which were shipped in interstate commerce into the State of Missouri. In 1939, Anheuser-Busch contracted with the Borsari Tank Corporation to construct an additional tank building at a cost of approximately $500,000. Pursuant to that contract, the Borsari Tank Corporation contracted for

and intended to have large quantities of building materials shipped in interstate commerce directly to the site of the Anheuser-Busch brewery. (R. 3–4.)

The Gaylord Container Corporation manufactures paper boxes, cardboard containers, and other articles in many states, including Missouri, and makes substantial sales and shipments of these articles in interstate commerce. It leases from Anheuser-Busch premises adjacent to the Anheuser-Busch brewery in St. Louis. On August 1, 1939, the Gaylord Container Corporation contracted with L. O. Stocker Company, a general building contractor in St. Louis, for the construction of an additional office building on these leased premises costing about $70,000. For its use in performing this construction contract, L. O. Stocker Company contracted to purchase large quantities of structural steel and other building materials which were to have been shipped in interstate commerce directly to the building site in St. Louis. (R. 4.)

The background of the combination and conspiracy.—The combination and conspiracy charged in the indictment did not grow out of any dispute between Anheuser-Busch and the union labor involved, but out of a jurisdictional controversy between two rival unions—the Brotherhood of Carpenters and the International Association of Machinists (hereinafter referred to as "the Machinists' Union"). Both unions are affiliated with the American Federation of Labor (R. 2). The

Brotherhood of Carpenters has claimed for many years that only its members and no one else is entitled to erect and dismantle all kinds of machinery, both metal and wooden. The International Association of Machinists insisted on the right of its members to work on machinery. The Brotherhood of Carpenters has called strikes at "divers times and places" for the sole purpose of preventing members of the Machinists' Union from erecting and dismantling machinery. To settle this dispute and stop these strikes, the defendant Hutcheson, as general president of the Brotherhood of Carpenters, concluded an agreement on October 24, 1932, with the Machinists' Union. On April 14, 1933, however, the defendant Hutcheson and the secretary of the Brotherhood of Carpenters repudiated their agreement. Thereafter jurisdictional strikes began all over again and up to the time of this indictment continued to impose a direct and unreasonable burden and restraint upon trade and commerce among the several states. (R. 5.)

Anheuser-Busch unwillingly became involved in this jurisdictional warfare in the following way: In June 1939 it was employing in St. Louis about 78 members of the Brotherhood of Carpenters and 80 members of the Machinists' Union. The company had separate written agreements with each of these unions, prescribing wages, hours of labor, and other conditions of employment, which were

substantially the same for both unions. The Anheuser-Busch agreement with the Machinists' Union, following the settlement between the unions themselves in 1933, provided that the machinists should do "the erecting, assembling, installing, and repairing of all metal machinery or parts thereof." The agreement with the Brotherhood of Carpenters provided that "the work to be done by the members of the union under this contract, shall be as, when, and where determined and designated by the employer," and further expressly stipulated that any grievances, not adjusted by a conference with a shop steward or a foreman, should be submitted to arbitration and that no employee should strike because of any grievance until these remedies had been exhausted. (R. 6.)

On a number of occasions between October 24, 1933, and November 3, 1939, the defendants Klein, Callahan, and Ottens, acting under the direction of the defendant Hutcheson, and purporting to represent the Carpenters District Council of St. Louis and the Brotherhood of Carpenters, demanded that Anheuser-Busch violate its agreement with the Machinists' Union and employ members of the carpenters' union instead of machinists to erect, assemble, and install all machinery in its plant (R. 6–7). This demand was made with the knowledge that Anheuser-Busch had agreed with the Machinists' Union that its members should erect, assemble, install, and repair all metal ma-

chinery (R. 8). Anheuser-Busch requested over and over again that the defendants live up to their contract and submit the dispute to arbitration. Representatives of the Machinists' Union made the same request. The defendants, however, refused to arbitrate. (R. 9–10.) Instead they delivered an ultimatum and thereafter began the combination and conspiracy described in the indictment to compel Anheuser-Busch by the threats of boycotts and strikes to comply with their demands (R. 9).

At no time during the period covered by the conspiracy was there any dispute between Anheuser-Busch and the members of the Brotherhood of Carpenters concerning the terms and conditions of their employment (R. 8).

The combination and conspiracy.—The defendants are charged with having knowingly, willfully, and unlawfully combined in a conspiracy in restraint of trade and commerce among the several states in violation of Section 1 of the Sherman Act, and particularly (R. 7):

> 1. In restraint of the flow into Missouri of commodities and materials intended for use (a) by Anheuser-Busch in the brewing of beer and the manufacture of ice-cream cabinets, (b) by Borsari Tank Corporation in the construction of tank buildings for Anheuser-Busch, and (c) by L. O. Stocker Company in the construction of a building for the Gaylord Container Corporation;
>
> 2. In restraint of the flow from Missouri to other states of beer brewed by Anheuser-

Busch and ice-cream cabinets manufactured by Anheuser-Busch; and

3. In restraint generally of the interstate trade and commerce of Anheuser-Busch, Borsari Tank Corporation, the Gaylord Container Corporation, and L. O. Stocker Company.

It is specifically charged that the defendants Ottens, Callahan, and Klein, under the direction and approval of the defendant Hutcheson, notified Anheuser-Busch on or shortly before June 28, 1939, that unless it would agree to employ members of the Brotherhood of Carpenters exclusively for the work of erecting, assembling, and installing all machinery in the St. Louis brewery, they would (a) call a strike of all millwrights, carpenters, and cabinet makers in the employ of Anheuser-Busch, (b) instigate a sympathy strike against Anheuser-Busch by all its employees who were members of any American Federation of Labor affiliated unions, and (c) prevent not only all members of the Brotherhood of Carpenters but also members of other building trades unions affiliated with the American Federation of Labor from working for independent contractors on the construction of buildings for Anheuser-Busch, including the tank building contracted to be constructed by Borsari Tank Corporation (R. 9).

Pursuant to and in furtherance of this conspiracy, the defendants (a) called a strike of the millwrights, carpenters, and cabinet makers employed

by Anheuser Busch, (b) attempted to instigate sympathy strikes among employees of Anheuser-Busch, who were members of other unions, and (c) picketed the premises of Anheuser-Busch and the adjoining premises of the Gaylord Container Corporation. All of these steps were taken (R. 10):

> *with intent to shut* down the brewery and manufacturing plant of Anheuser-Busch, Inc., *to hinder and prevent* the passage of persons and property to and from said premises, and thus *to restrain and stop the commerce* of Anheuser-Busch, Inc., * * *, and to restrain the commerce of Gaylord Container Corporation * * *. [Italics supplied.]

Pursuant to and in furtherance of the conspiracy the defendants also (R. 10):

> instigated, promoted, and brought about a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States, by distributing printed circulars and sending letters to local unions, councils, and individual members of United Brotherhood of Carpenters and Joiners of America and of other trade and labor unions affiliated with American Federation of Labor and to Members of the public at large in many of the states, and by publishing notices in "The Carpenter," an official periodical publication of United Brotherhood of Carpenters and Joiners of America, circulated in all of the states of the United States,

> denouncing Anheuser-Busch, Inc., as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer, *all with the intent and effect of restraining* and stopping the commerce therein * * *. [Italics supplied.]

Pursuant to and in furtherance of this conspiracy, the defendants refused to permit members of the Brotherhood of Carpenters to work for Borsari Tank Corporation with the intent and effect of preventing the construction of the tank building for Anheuser-Busch, thus restraining the commerce of Anheuser-Busch in beer. This was done with knowledge and wilful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used for the construction of the tank building. (R. 10–11.)

Pursuant to and in furtherance of the conspiracy, the defendants also prevented L. O. Stocker Company from employing members of the Brotherhood of Carpenters, with the intent and effect of preventing that company from performing its contract with Gaylord Container Corporation for the construction of an additional office building. This was done with knowledge and wilful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used for the construction of that building. (R. 11.)

B. THE DECISION OF THE COURT BELOW

The separate demurrers filed by the defendants were identical in form and alleged generally that the indictment did not plead facts which constitute an offense under the laws of the United States (R. 13–16).

In sustaining the demurrers, the District Court did not hold the indictment defective as a pleading; it sustained the demurrers on the ground that the acts charged were not crimes within the meaning of the Sherman Act. The opinion assigned different grounds of invalidity to different allegations of the indictment. Thus the court held that the allegations charging the defendants with picketing the premises of Anheuser-Busch and of Gaylord Container Corporation, and with refusing to allow the members of the union to be employed by the Borsari Tank Corporation and L. O. Stocker Company, when considered separately, did not allege a conspiracy "to directly restrain interstate commerce" within the meaning of the Sherman Act. (R. 19.) The court further held that, although the allegations of the indictment with respect to the nationwide boycott of Anheuser-Busch beer and dealers in that beer did set forth an attempt to interfere with interstate commerce in that product (R. 20), the boycott was not illegal under the Sherman Act because "labor unions engaging in jurisdictional strikes are immune from suit in the Federal courts so long as lawful means are

employed under the provisions of the Norris-LaGuardia Act" (R. 20).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that the indictment does not allege sufficient facts to show a conspiracy in restraint of interstate trade and commerce within the meaning of the Sherman Act.

(2) In holding that the allegations in the indictment concerning the activities of the defendants in picketing the premises of Anheuser-Busch, Inc., and Gaylord Container Corporation, as well as the refusal to allow their members to be employed by Bosari Tank Corporation and L. O. Stocker Co., failed to allege a conspiracy in direct restraint of interstate commerce.

(3) In holding that the real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce but to prevail in a local labor controversy.

(4) In holding that allegations relating to the boycott of Anheuser-Busch beer did not set forth an illegal conspiracy under the Sherman Act because the defendants did not employ unlawful means or attempt an unlawful purpose.

(5) In holding that the Norris-LaGuardia Act so modifies the Sherman Act as to make immune from suit labor unions employing lawful means to conduct jurisdictional strikes.

(6) In separating the various means and methods described in the indictment into two categories and in holding that the indictment did not charge a conspiracy within the Sherman Act because some of the allegations did not allege a direct restraint on interstate commerce and because the others, although alleging a direct restraint on interstate commerce, did not show an unlawful purpose.

(7) In sustaining the demurrers and dismissing the indictment.

SUMMARY OF ARGUMENT

Under the rule in *United States* v. *Borden Co.*, 308 U. S. 188, the present appeal presents for review two questions of law: (1) does the indictment charge a "direct" restraint on interstate commerce, and (2) are labor unions engaged in jurisdictional strikes immune from prosecution if in furtherance thereof they combine to do the acts charged in the indictment. These two questions of law can most conveniently be discussed under four headings: (1) that the indictment charges a direct and intentional restraint of interstate commerce; (2) that it charges the kind of restraint which is illegal under the Sherman Act; (3) that it charges an unreasonable restraint under the Sherman Act; and (4) that the Norris-LaGuardia Act has not modified or amended the Sherman Act so

as to prevent prosecution of the conspiracy charged in the indictment.

I

The indictment charges a direct physical restraint of interstate commerce in goods manufactured and sold by Anheuser-Busch, in goods manufactured and sold by the Gaylord Container Corporation, in building materials intended for Anheuser-Busch, Bosari Tank Corporation, L. O. Stocker Co., and Gaylord Container Corporation, and in materials purchased by Anheuser-Busch for the production of its goods. It further alleges that the defendants had the purpose and intent to restrain this interstate commerce. These allegations are clearly sufficient to show a direct and deliberate restraint of interstate trade.

Certainly if the competitors of Anheuser-Busch had combined to prevent it from shipping raw materials and beer in interstate commerce, to instigate strikes in its plant, and to boycott and interfere with the interstate commerce of persons who had dealings with Anheuser-Busch, their activities could not be described as affecting interstate commerce only incidentally and indirectly. The fact that the defendants are officers of a labor union and not competitors is immaterial; for the purpose of determining whether interstate commerce has been directly and intentionally restrained, the test is the same in both situations.

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II

The indictment also charges the kind of restraint which is illegal under the Sherman Act.

In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, this Court held that a labor union, in the course of a labor dispute with an employer over such issues as collective bargaining, wages, hours, or conditions of labor, can, without violating the Sherman Act, conduct a local strike whch closes a factory, even though this prevents the shipment of goods in interstate commerce. The conspiracy charged in the present indictment is, however, radically different.

In the first place there is here no mere local dispute between an employer and his employees, and the acts charged to the defendants are not merely local activities conducted in a single factory and subject to the supervision and control of the local authorities. The indictment in this case charges rather that a restraint of trade has been imposed as a result of a jurisdictional dispute between two national unions and that this dispute has resulted in many different strikes in many different places which have imposed a direct and unreasonable burden upon interstate trade. It further charges that the defendants sought to force Anheuser-Busch to take its side in this dispute and, when Anheuser-Busch refused, that they engaged in a deliberate campaign on a national scale to drive Anheuser-Busch from the interstate market. Defendants'

activities in this campaign were in no sense local in character and they were not subject to the control of the local authorities.

In the second place, the objective of the conspiracy was not the protection and advancement of the rights of labor, such as collective bargaining, wages, hours, or working conditions; it was rather to win by force a jurisdictional dispute with another union and to deprive the members of that other union of work. Defendants attempted to destroy the interstate business of Anheuser-Busch, and to restrain the interstate trade of the other companies, because they hoped by these methods to compel Anheuser-Busch to side with them in the jurisdictional dispute. The holding in the *Apex* case that a union may stop production in a local factory in order to achieve union recognition is not authority for a similar holding when the objective of the union is to win by force a nation-wide contest, not with the employer, but with another union.

In the third place, the objective of the union in this case was sought to be achieved not, as in the *Apex* case, by interfering with the business of the other party to the dispute, but by stopping interstate trade to or by four companies, with only one of which it had any relation and against none of which it had any real grievance. The purpose of the defendants in restraining the interstate commerce of Anheuser-Busch was to compel it to become a partisan in the fight between the Brother-

hood of Carpenters and the Machinists' Union. The purpose of the defendants in restraining the interstate commerce of the other companies was to compel them to put pressure on Anheuser-Busch to become a partisan in the jurisdictional dispute. This aspect of the defendants' activities indicates an intent and purpose to interfere with interstate commerce on a far broader scale than the closing of one local plant; it raises a question quite distinct from that in the *Apex* case, where all the activities of the union were directed to stopping the operation of the employer's plant alone.

The opinion in the *Apex* case recognizes that the type of restraint charged to the defendants in this case, because it actually and potentially interferes with competitors in every direction, is within the prohibitions of the Sherman Act. The test laid down in that case is whether the restraint is "upon commercial competition in the marketing of goods or services". The mere closing of a factory is not enough to bring the case within that test. But if, as in this case, the restraints go beyond that and are directed toward driving an employer, against whom the union has no real grievance, from the interstate market and to interfere with the interstate commerce of persons dealing with the employer, the application of the Sherman Act is clear.

In *Loewe* v. *Lawlor*, 208 U. S. 274, *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters'*

Ass'n, 274 U. S. 37, this Court held that activities similar in all important respects to the activities of the defendants here restrained commerce within the meaning of the Sherman Act. Unless this Court is now prepared to overrule those decisions, the decision below must be reversed.

But even if the Court should deem that those earlier decisions no longer have vitality, it would still not follow that the indictment here charges a restraint which is beyond the scope of the Sherman Act. The purpose and intent of defendants' activities were to exclude Anheuser-Busch from the interstate market. The exclusion of a trader from the market, or the erection of arbitrary barriers to free access to the market, has long been recognized both under the Sherman Act and the common law as a restraint of trade. While the greater number of the decisions of this Court interpreting and applying the Sherman Act have involved arrangements designed to limit production or to fix prices, this Court has in a number of cases struck down restraints, not because of their effect upon prices or production, but because they operated to destroy free access to the market.

III

A cursory examination of the character and consequences of jurisdictional strikes makes it apparent that the restraint charged in the indictment may not be justified under the "rule of reason"

enunciated in *Standard Oil Co.* v. *United States*, 221 U. S. 1.

There is no form of labor warfare so opposed to the public interest and to the interest of organized labor itself as the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor. An employer who finds himself the victim of such a strike is powerless to remedy the situation. There is no concession he can make which will stop the attack on his business. Similarly, the union whose relations with the employer the other union seeks to disrupt cannot rely on its satisfactory service or its superior craftsmanship to maintain its position; it has no weapon, other than ruthless economic warfare, to defend itself against the aggressive tactics of those who would destroy it.

If unions grow with the efficiency and ability of their leaders to gain advantages for labor, good union leadership may be expected. But if a union is permitted to expand through the mere brutal use of power against neutral employers, there will be a premium on ruthless and coercive leadership. Consequently it is essential to the growth of an intelligent labor movement that competing unions should not succeed or fail solely with reference to their ability to bring pressure against each other. If, as this Court has said, the Sherman Act is a charter of freedom, it must include within its prohibitions the destruction of one labor organization

by another through force and coercion at the expense of innocent bystanders and the tying up of the business of the public at large.

IV

The court below erred in holding that the Norris-LaGuardia Act modified or amended Section 1 of the Sherman Act so as to make lawful thereunder activities which might otherwise be illegal. The Norris-LaGuardia Act does nothing more than limit the equity powers of the federal courts. It affords no ground for construing the Sherman Act as inapplicable to the acts charged in the indictment.

ARGUMENT

I

THE SCOPE OF THE ISSUES ON THIS APPEAL

The rule which limits the jurisdiction of this Court under the Criminal Appeals Act was stated in *United States* v. *Borden Co.*, 308 U. S. 188, 207, in these words:

> For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction.

Under this rule we conceive that the Court has before it two questions of law: (1) Does the indictment charge a "direct" restraint of interstate

commerce; and (2) Are labor unions, engaged in jurisdictional strikes, immune from prosecution if, in furtherance thereof, they combine to do the acts charged in the indictment?

A. All of the allegations of the indictment must be considered.—It is important to point this out because the court below separated the various means and methods described in the indictment into two categories and pursued a different line of reasoning as to each of them. The first category concerned the allegations as to strikes and picketing against Anheuser-Busch, Gaylord Container Corporation, and L. O. Stocker Company. These particular allegations, the court held, did not allege a "direct" restraint on interstate commerce (R. 19). The second category concerned the allegations as to the nation-wide boycott of Anheuser-Busch beer and of dealers in that beer. These allegations, the court held, did charge an attempt to interfere directly with interstate commerce, but, nevertheless, were not unlawful because the purpose of the conspiracy—the conduct of a jurisdictional controversy—made it immune from prosecution when carried out by lawful means (R. 20–21).

In reviewing the construction of the lower court that the indictment does not charge a conspiracy to impose a direct restraint on interstate commerce, this Court must consider *all* of the allegations and not merely those which relate to strikes and picket-

ing. Similarly, in considering whether the acts charged are immune from prosecution because they are in furtherance of a jurisdictional demand, the court is free to examine all of the means used to further that demand and not simply the boycott selected by the court below. A rule requiring this Court to review the construction of the court below in relation to only those parts of the indictment which it happened to select, and without reference to the whole indictment, would be, in effect, to rewrite the indictment by splitting it up into a number of conspiracies when only one was charged. In addition, an indictment for conspiracy is, of course, good if any one of the means and methods charged shows the commission of the offense; it is not necessary that all of the means and methods be criminal. Therefore, an appellate review which decided on the criminality of the methods used to further a conspiracy one at a time would compel a series of appeals on the same indictment.

B. The scope of the first question to be reviewed. The question is: Does the indictment charge a direct restraint of interstate commerce? That question may be divided into two parts.

(a) Is the amount of interstate commerce restrained sufficient to come within the purview of federal power, and

(b) Does the *purpose* of the conspiracy make that restraint remote or incidental to the objectives of the Sherman Act?

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The first part (a) of this question obviously must be reviewed here. The second part (b) requires an explanatory comment.

When the District Court based its decision in part upon the ground that the indictment did not "allege a conspiracy to directly restrain interstate commerce" (R. 19), it is quite clear that the court realized that interstate commerce had been restrained in some degree. It refers to this restraint as "incidental." It is clear from the opinion that the *reason* the court felt this restraint to be incidental was because the purpose of the defendants made it a kind of restraint not prohibited by the Sherman Act. In reviewing this conclusion by the lower court, it is necessary to consider the doctrine relating to the kinds of restraints prohibited by the Sherman Act laid down in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, insofar as it applies to the indictment in this case.

C. The scope of the second question to be reviewed.—The second question is: Are labor unions, engaged in jurisdictional strikes, immune from prosecution if in furtherance thereof they do the acts charged in the indictment?

It would be possible to argue that this second question was narrower than the above statement indicates because the court gave as its reason that the Norris-LaGuardia Act had changed the law so as to prevent prosecution. From this it might be contended that the only reviewable issue was the effect of the Norris-LaGuardia Act on the charges

of the indictment. Such a construction of the scope of the review in this case seems too narrow to be workable. It would mean, for example, that if the Norris-LaGuardia Act constituted no reason for immunity from these particular charges, but, nevertheless, the union was immune for some reason stated in the recent *Apex* case, the lower court would have to be reversed because of an incorrect reason given for a correct construction of the Sherman Act. We do not believe that this is what the rule in the *Borden* case means. We consider that the question of construction of the Sherman Act, which this Court is empowered to review, is whether jurisdictional strikes enforced by the means charged in the indictment are immune from prosecution. That was the conclusion of the court below, and we do not believe that this Court is confined to the logical analysis made by the court below in reaching that conclusion. If it were confined to that analysis, the final determination of a case like this might require a series of separate appeals, each of which condemned some wrong reason for a right result, until by a process of elimination the court below finally hit upon the correct reason for its construction of the Act. It is impossible to believe that the Criminal Appeals Act contemplated any such unworkable, piecemeal review as that.

The situation is analogous to a case where the lower court dismisses an indictment because the statute on which it is based is invalid. It is settled

that in such circumstances an appeal under the Criminal Appeals Act opens for review any reason, whether or not it was the one selected by the court below, which would sustain its ruling. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

The questions open to review in this case can most conveniently be discussed under four headings: (1) that the indictment charges a direct and intentional physical restraint of interstate commerce within the meaning of the Sherman Act; (2) that it charges the kind of restraint which is illegal under the Sherman Act; (3) that it charges an unreasonable restraint under the Sherman Act; and (4) that the Norris-LaGuardia Act has not modified or amended the Sherman Act so as to prevent the prosecution of the conspiracy charged in the indictment.

II

THE INDICTMENT CHARGES A DIRECT AND INTENTIONAL RESTRAINT OF INTERSTATE COMMERCE WITHIN THE MEANING OF THE SHERMAN ACT

The indictment charges the defendants with having conspired to restrain interstate commerce (R. 7–8):

> (1) in building materials intended for Anheuser-Busch, Borsari, Stocker and Gaylord;
>
> (2) in malt, hops, barley, rice, compressor units, copper tubing, sheet copper, cork, Cop-R-Loy tanks, valves, grills, and wire

screens purchased by Anheuser-Busch and shipped into Missouri from other states;

(3) in beer and ice-cream cabinets manufactured by Anheuser-Busch for shipment from Missouri into the several states; and

(4) in paper products manufactured by Gaylord for shipment out of Missouri.

No doubt can exist as to the interstate character of this commerce. See *Local 167* v. *United States,* 291 U. S. 293; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533.

The indictment alleges that the acts of the defendants in fact had the effect of restraining interstate commerce in these commodities (R. 10–11).[1] These allegations, which must be taken as true for the purposes of the demurrers, preclude any argument that the conspiracy in fact has no real effect on the commerce described in the indictment. That defense, if it is to be made at all, must await a trial on the merits.

The indictment supplies no basis for an argument that no substantial amount of commerce was

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[1] Paragraph 34 alleges generally that the defendants have engaged in the conspiracy "with the * * * effect of restraining such commerce in the commodities and materials aforementioned" (R. 11). Paragraph 32 alleges that the

affected by the conspiracy.[2] The language used by this Court in its opinion in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, is applicable here (p. 484):

> Here the strikers' activities were as closely related to interstate commerce and affected it as substantially as numerous other activities not in themselves interstate commerce which have nevertheless been held to be subject to federal statutes enacted in the exercise of the commerce power.

In any event, the quantity of commerce affected is not controlling: "* * * it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation." *Apex Hosiery Co.* v. *Leader, supra,* at 485.

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defendants boycotted Anheuser-Busch beer and dealers in the beer, "with the intent *and effect* of restraining and stopping the commerce therein" (italics supplied) (R. 10). Paragraphs 33 and 34 allege that there was a "consequent restraint and stoppage of commerce" in building materials intended to be used by Borsari Tank Corporation and L. O. Stocker Company (R. 10–11).

[2] The value of the building which Anheuser-Busch, Inc., was about to construct when prevented by appellees is fixed in the indictment at approximately $500,000. The building materials were to be drawn largely from interstate commerce (R. 4). Similarly, the building which Gaylord had contracted to erect for Stocker was valued at $70,000 and materials for this likewise were to be shipped in interstate commerce into Missouri (R. 4).

The indictment does not allege the value of the commodities which Anheuser-Busch, Inc., shipped into Missouri for use in brewing beer or the value of the beer shipped out of

It was error for the court below to conclude that the defendants had not violated the Sherman Act because their intent or motive was primarily local in character. The indictment charges that the defendants intended to restrain interstate commerce. It alleges that they called a strike and attempted to instigate a "sympathy" strike against Anheuser-Busch and caused the picketing of the premises of that company and of Gaylord Container Corporation (R. 10)

> with intent to shut down the brewery and manufacturing plant of Anheuser-Busch, Inc., to hinder and prevent the passage of persons and property to and from said premises, and thus to restrain and stop the

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the State. Public and official records of the State of Missouri (cf. *Arizona* v. *California*, 283 U. S. 423, 453) show that the amount of beer shipped in interstate commerce was substantial. The amount of out-of-state sales is contained in the monthly public report filed by Anheuser-Busch with the Missouri State Liquor Supervisor, Jefferson City, Missouri. This report is a matter of public record. Taking the figures for the slackest month of the year, December, the following out-of-state sales are shown for 1939:

	5% Beer Shipped Out of State	3.2% Beer Shipped Out of State	Totals
Bbls	8,742	235	8,707
½ Bbls	117,872	10,10[illegible]	127,977
¼ Bbls	14,476	1,849	16,325
Cases 24/12-oz. Bottles	919,454	55,750	975,204
Cases 12/24-oz. Bottles	10,300	2,305	12,605

> commerce of Anheuser-Busch, Inc., described in paragraphs 12 and 13 hereof, and to restrain the commerce of Gaylord Container Corporation, described in paragraph 16 hereof.

It is also alleged that the refusal of the defendants to allow union members to work for Borsari Tank Corporation in constructing a tank building for Anheuser-Busch was with the intent of restraining the interstate commerce of Anheuser-Busch in beer and ice-cream cabinets (R. 10–11). These allegations plainly charge an intent to prevent Anheuser-Busch from carrying on any interstate commerce whatsoever. Any doubt as to the defendants' intent is removed by the allegation that they carried on a nation-wide boycott of Anheuser-Busch beer and of dealers in that beer for the purpose of restraining commerce in that beer (R. 10).

Moreover, even if the indictment lacked these allegations as to intent and contained nothing more than a description of the defendants' activities and of their effect, the decision below would be erroneous. The attempt to shut down the plant of Anheuser-Busch and to bar that company from the interstate market by calling a strike, instigating sympathy strikes, picketing the premises, and conducting a nation-wide boycott of Anheuser-Busch beer and of dealers in that beer, was an effort to stop a business which was interstate in all of its aspects (R. 2–3, 10). If the attempt were success-

ful, its necessary result would be to stop the movement of commodities in interstate commerce.

In like manner, picketing the plant of Gaylord Container Corporation was an attempt to interfere with an interstate business. The refusal of defendants to allow members of the carpenters' union to work for Borsari Tank Corporation and for L. O. Stocker Company is alleged to have been made "with knowledge and willful disregard of the consequent * * * stoppage" of shipment in interstate commerce of building materials for two buildings, the total cost of which was to be in excess of $500,000 (R. 11).

All of these acts were conscious and deliberate. If successful, their inevitable result would be to obstruct interstate commerce. This being so, it is immaterial that the ultimate motive for the acts was not related directly to interstate commerce. The defendants "must be taken to have intended the natural and probable consequences of their acts." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 485–486; cf. *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *United States* v. *Brims,* 272 U. S. 549; *Local 167* v. *United States,* 291 U. S. 293; *United States* v. *Painters District Council No. 14,* 44 F. (2d) 58 (N. D. Ill.), affirmed, 284 U. S. 582.

Certainly if the competitors of Anheuser-Busch had combined to prevent it from shipping raw ma-

terials and beer in interstate commerce, to instigate strikes in its plant, and to boycott persons who had dealings with Anheuser-Busch, their activities could not have been described as affecting interstate commerce "only incidentally and indirectly." The fact that the defendants are officers of a labor union and not competitors is immaterial; for the purpose of determining whether interstate commerce has been directly and intentionally restrained the test is the same in both cases.

III

THE INDICTMENT CHARGES THE KIND OF RESTRAINT WHICH IS ILLEGAL UNDER THE SHERMAN ACT

We have shown that the indictment here charges a direct and intentional restraint of interstate commerce. In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, however, this Court held that all restraints on the interstate movement of goods are not illegal under the Sherman Act and that the prohibitions of the statute extend only to those restraints which in one way or another suppress competition in the interstate market. The question remains, therefore, whether the direct and intentional restraint charged by the indictment here is the kind of restraint which the Sherman Act forbids.

The opinion in the *Apex* case discusses at length the purpose of the Sherman Act and the nature of the restraints which it was intended to prevent. This discussion is cast in somewhat general terms and must necessarily be read against the back-

ground of the particular facts then before the Court. The decision was, of course, not intended to, and it did not, establish rules governing all cases involving the application of the Sherman Act to the activities of labor unions. Nevertheless, the opinion makes it possible to segregate the cases of clear illegality from the cases of apparent immunity, and thus to delimit the area within whose boundaries the application of the law is still uncertain.

On the one hand lies the conventional combination of traders to suppress competition by fixing prices, restricting production, or otherwise controlling the market; these activities fall squarely within the scope of the Act. And if a labor organization becomes a party to a combination of this kind, it enjoys no immunity from prosecution. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 501; *United States* v. *Brims,* 272 U. S. 549. At the other extreme, a labor organization, in the course of a labor dispute with an employer over such issues as collective bargaining, wages, hours or conditions of labor, can, without violating the Sherman Act, conduct a local strike which closes a factory, even though this prevents the shipment of goods in interstate commerce. *Apex Hosiery Co.* v. *Leader, supra.*

No contention is made in this case that the indictment charges a conventional combination by commercial competitors to fix prices or to control production. On the other hand, the conspiracy which is charged is, in many material respects, so

radically different from the conspiracy involved in the *Apex* case that the *Apex* decision cannot be deemed controlling in the present situation.

A. THE DISTINCTIONS IN FACT BETWEEN THIS CASE AND THE APEX CASE

In the *Apex* case a labor union committed acts conceded to be unlawful under state law (forcible possession of a plant by a sit-down strike) in order to coerce the employer to establish a closed shop. No organizations were involved or brought into the dispute except the employer and the labor union. The union was demanding that the employer assist it by excluding nonunion individuals from his employment, but there were no boycotts or sympathetic strikes against those who dealt with the employer to prevent them from contracting with him or from buying his goods if he did not establish a closed shop. The only effect on consumers in interstate commerce was a slight diminution of the supply because of the temporary closing of the factory. There was no attempt to fix prices—a power held by this Court to be so inherently dangerous that its illegality does not depend on the extent of its immediate effect on the market as a whole. Nonunion laborers were affected, but to no greater extent than always happens when a union closes a plant by a strike.

The present situation is different in at least three major respects. In the first place, there is here no mere local dispute between an employer and his

employees, and the acts charged to the defendants are not merely local activities conducted in a single factory and subject to the supervision and control of the local authorities. The indictment in this case charges rather that a restraint of trade has been imposed as a result of a jurisdictional dispute between two national unions, that this dispute has resulted in many different strikes at many different times and places, and that "such strikes and disputes have imposed, and are imposing a direct, unreasonable burden and restraint upon trade and commerce among the several states" (R. 5). It further charges that the Brotherhood of Carpenters sought to force Anheuser-Busch to take its side in this dispute and, when Anheuser-Busch refused, that it engaged in a deliberate campaign on a national scale to drive Anheuser-Busch from the interstate market. One weapon of this campaign was a boycott carried on throughout the United States and directed against beer brewed and sold by Anheuser-Busch and against those who dealt in that beer. The activities of the Brotherhood of Carpenters in its campaign to drive Anheuser-Busch from the interstate market were not subject to the control of local authorities, as were the activities of the union involved in the *Apex* case. Consequently, if those activities be held not subject to federal control under the Sherman Act, a no-man's land will have been created in which both state and national authorities are powerless to prevent a stoppage of interstate trade.

In the second place, the national campaign waged by defendants against Anheuser-Busch did not have as its objective the protection and advancement of the rights of labor, such as collective bargaining, wages, hours or working conditions; the objective was rather to win by force a jurisdictional dispute with another union, the dispute being of nation-wide scope and having a direct effect on nation-wide commerce. Anheuser-Busch had bargained collectively with both the Brotherhood of Carpenters and the Machinists' Union and for several years had had contracts with both unions (R. 6–7). There was no controversy between Anheuser-Busch and the members of the Brotherhood of Carpenters in its employ as to wages, hours, or working conditions (R. 7). The defendants attempted to destroy the interstate business of Anheuser-Busch, and to restrain the interstate trade of the other companies, who were all innocent of any interest in the jurisdictional dispute, because they hoped by these methods to compel Anheuser-Busch to become a partisan in the jurisdictional dispute and thus to impair or to destroy the collective bargaining power of the machinists. The holding in the *Apex* case that a union may, without federal interference, stop production in a local factory in order to achieve union recognition is not authority for a similar holding where the objective of the union is to win by force a nation-wide contest, not with the employer, but

with another union, and to deprive the members of that other union of work.

In the third place, the objective of the union in this case was sought to be achieved not, as in the *Apex* case, by interfering with the business of the other party to the dispute, but by stopping interstate trade to or by four companies, with only one of which it had any relation and against none of which it had any real grievance. The defendants' quarrel here is with the Machinists' Union; it is not a quarrel which Anheuser-Busch provoked or in which Anheuser-Busch has any financial interest. Yet the defendants sought to deprive Anheuser-Busch of access to the interstate market, simply to compel it to side with the Brotherhood of Carpenters. Innocent bystanders were brought into the fight by an attack directed against the dealers who sold Anheuser-Busch beer. The interstate commerce of local concerns who had no interest in the controversy was also attacked. The Borsari Tank Corporation, against whom the defendants had no grievance, found itself deprived of the opportunity to complete a building contract, the materials for which were to have been bought and shipped in interstate commerce. The Gaylord Container Company, which manufactured paper boxes for interstate shipment, found its interstate trade restrained by picketing and its building operations hindered and delayed in order to compel it to break off normal commercial relations with Anheuser-Busch.

The purpose of the defendants in restraining the interstate commerce of these various businesses and firms was to compel them to become partisans in the fight between the Brotherhood of Carpenters and the Machinists' Union. They wanted Anheuser-Busch to enlist on their side at the risk of suits for breach of contract, strikes and boycotts on the part of the machinists. The carpenters put pressure on the Borsari Tank Company in order to get it to put pressure on Anheuser-Busch to enter the war on their side. They tried to coerce the Gaylord Company to stop its business relations with Anheuser-Busch so that this company would also put pressure on Anheuser-Busch to enter the fight on the side of the carpenters. They hindered L. O. Stocker Company, which was building an office building for the Gaylord Company, in order to induce the Stocker Company to induce the Gaylord Company to induce Anheuser-Busch to help the carpenters. And, of course, if these pressures are legal, then it would have been equally legal for the Machinists' Union to enlist or compel a different set of people to put pressure on Anheuser-Busch so that they would line up against the carpenters. Therefore, if Anheuser-Busch were forced to give in to the carpenters, their war with the machinists would just be beginning, with no end in sight except the collapse of the employer or one of the two unions.

This aspect of the defendants' activities indicates an intent and purpose to interfere with inter-

state commerce on a far broader scale than the closing of one local plant; it raises a question quite distinct from that in the *Apex* case, where all the activities of the union were directed to stopping the operation of the employer's factory alone. This Court has always regarded interference with the commerce of persons not dealing directly with the defendants and not engaged in any controversy with them, as indicative of the kind of restraint which the Sherman Act forbids. *Loewe* v. *Lawlor*, 208 U. S. 274, 294–295; *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600. In the latter case this Court said (pp. 612–613):

> In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the prohibited class of undue and unreasonable restraints * * *.

Because of the material distinctions between the present case and the *Apex* case, we believe it clear that the question here presented is far from foreclosed by the *Apex* decision. To the contrary, the

situation revealed by the indictment seems squarely covered by the earlier decisions of this Court in *Loewe* v. *Lawlor*, 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, and *Bedford Cut Stone Co.* v. *Journeyman Stone Cutters' Ass'n*, 274 U. S. 37, which were specifically distinguished in the *Apex* opinion. For reasons more fully developed below (pp. 45–47), we believe that the decision below must be reversed unless it be held that these other decisions no longer have vitality.

B. THE RATIONALE OF THE APEX OPINION DOES NOT SUPPORT THE DECISION BELOW

It is true that the opinion in the *Apex* case does contain language which, read apart from the background of the particular facts which the Court was considering, would militate against our position in this case. The stress of the opinion was on the principle that a restraint, to come within the Sherman Act, must be one which restrains "commerical competition in the marketing of goods or services" (p. 495). The precise content of this principle, however, and its application to the present case can properly be understood only by reference to the particular situation which the Court was considering in the *Apex* case.

There, as we have pointed out, the defendants had taken possession of the plaintiff's factory and, by so doing, had prevented the shipment of goods in interstate commerce. In one sense these acts suppressed competition; they certainly impaired

the power of the Apex Hosiery Company to compete in the interstate market. But despite this fact, the Court held that the restraint was not one upon "commercial competition", and, therefore, was not within the scope of the Sherman Act. Literally, this decision might be interpreted to mean that the plaintiff had not proved that the *effect* of the conspiracy was such a restraint on trade or commerce as to bring it within the condemnation of the law. But that this interpretation could not have been intended is conclusively shown if we assume a situation in which a restraint, having precisely the same effect, was imposed by a competitor of the Apex Company in order to drive Apex from the market; in such a situation, the illegality of the restraint could not be questioned.

It is apparent, therefore, that it was not the *effect* of the restraint upon commercial competition which was determinative in the *Apex* case. The determinative factors seem rather to have been the local nature of the activities by which that effect was achieved (see pp. 490–491, 505–507, 508–509, 512–513), and the local and noncommercial objectives sought to be attained by the conspiracy (see pp. 501–504, 508–509, 512). Thus, although the defendants there had interfered intentionally with interstate commerce, they had not deliberately gone into the interstate market in an attempt to close that market to the goods of the Apex Company. Moreover, their acts were local in the sense that they were directed solely against the factory

of the Apex Company; they did not attempt to interfere with the interstate commerce of third persons in order to compel them to break off normal commercial relations with the company. Further, the defendants' acts were both local and noncommercial in purpose. Their objective was to unionize a local factory, and they made no attempt to achieve that purpose by an interference with commerce on a national scale or by interference with the commerce of third persons.

The situation here, as we have pointed out, is very different. Far from confining their conspiracy to local activities, defendants attempted by a nation-wide boycott to exclude the beer of Anheuser-Busch from the interstate market. By the same means they attempted to interfere with the normal commercial relationships of dealers who handle that beer. They likewise attempted to interfere with the interstate commerce of two companies which had no connection whatsoever with the jurisdictional dispute, but which did have contractual relations with Anheuser-Busch, and with the interstate commerce of a third company which had done nothing except to agree to erect a building on land leased by another person from Anheuser-Busch. The effect of all these activities was to impair the power of Anheuser-Busch to compete in the interstate market. The obvious purpose was to apply economic pressure to Anheuser-Busch by depriving it of the power to meet the competition

of other companies engaged in the same line of business.

The opinion in the *Apex* case recognizes that this kind of restraint, because it actually and potentially interferes with competitors in every direction, is within the prohibitions of the Sherman Act. The test laid down in that case, as we have shown, is whether the restraint is "upon commercial competition in the marketing of goods or services" (p. 495). The mere closing of a factory is not enough to bring the case within the test. But if the restraints go beyond that, the application of the Sherman Act is clear. Relevant illustrations, taken from the opinion, of restraints which have been held as coming within the Act show how many of the restraints which the Court considers prohibited by the Act are included in the facts of this case. We list a few mentioned in the opinion: (1) "restrictions on shipments * * * to restrain commercial competition in some substantial way" (p. 497); (2) "restraints * * * having those effects * * * on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law" (p. 498); (3) "undue limitation on competitive conditions" (p. 499); (4) "a secondary boycott by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the

complainants" (p. 505); (5) "a 'black list,' intended to persuade retailers not to deal with specified wholesalers" (p. 505); (6) "the refusal of the union to work on a product in the hands of the purchaser" (p. 505); (7) "discriminate between its would-be purchasers" (p. 511); (8) "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices *or otherwise control the market to the detriment of purchasers or consumers of goods and services,* all of which had come to be regarded as a special form of public injury" (italics supplied) (p. 493); (9) "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition" (pp. 500–501).

These excerpts from the opinion show the care which the court took to avoid even the inference that a conspiracy by a labor union which directly interfered with the interstate commercial relations of persons not parties to a labor dispute escaped the prohibitions of the Sherman Act. And there was another inference which the court was careful to avoid—the inference that in the case of power which carried grave *potential* danger to the commercial relations of others, there must be shown an

immediate and direct effect on the market. Price-fixing between the employer and the union was not involved in the *Apex* case. Nevertheless, the court took pains to point out that use of this power was illegal under the Act even in the absence of proof of immediate and direct injury to the commercial competitive relations of those who dealt in the product. The reason was the grave *potential* danger of the power to combine to fix prices. Taking *potential* danger as the test, the record shows that no power which can be exercised by a labor union more inevitably leads to the involvement of innocent bystanders than jurisdictional strikes. Indeed, there can be no jurisdictional strike without direct injury to at least one innocent bystander who is not a party to the dispute, *i. e.*, the employer caught between the two rival unions. In this case, the direct injury was spreading to others besides the employer, not only locally, but nationally. And the same dangerous potentiality exists in the case of every jurisdictional strike.

In *Loewe* v. *Lawlor,* 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n,* 274 U. S. 37, this Court held that activities similar in all important respects to the activities of the defendants here, restrained commerce within the meaning of the Sherman Act. In the first two of these cases, there were nation-wide boycotts of commodities and of dealers in commodities.

In the third case, a union attempted to close the channels of interstate commerce to the products of an employer by refusing to work upon those products after they came into the hands of purchasers. The similarity between these activities and the nationwide boycott of beer and of dealers in beer, and the interference with the interstate commerce of persons who had commercial relations with Anheuser-Busch, in this case, is too obvious to require elaboration.[3]

Nothing in the opinion of the Court in the *Apex* case suggests that these three decisions, insofar as they hold that the activities there involved imposed a restraint upon commerce within the meaning of the Sherman Act, are not good law today. The Court in speaking of these cases said (p. 506):

> It will be observed that in each of these cases where the Act was held applicable to

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[3] In *Loewe* v. *Lawlor*, 208 U. S. 274, the union engaged in a boycott of a manufacturer's product similar in all respects to the boycott of beer charged in the indictment here. The same kind of boycott was held to be a restraint of trade in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443. In both cases the boycott was directed against the product of the manufacturer with whom the union was in controversy and was designed to prevent its distribution in the interstate market. In *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Ass'n*, 274 U. S. 37, the restraint condemned was achieved not by a boycott of the product but by a refusal to work on the product after it had been produced and sold. This is comparable to the refusal of the defendants here to permit members of the Brotherhood of Carpenters to work for corporations which had contractual relations with Anheuser-Busch, Inc.

> labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases.

Unless this Court is now prepared to overrule its earlier decisions, it seems apparent that the decision below must be reversed.

C. A COMBINATION TO EXCLUDE PERSONS FROM THE MARKET IS ILLEGAL.

But even if this Court should deem that those earlier decisions no longer have vitality, it would still not follow that the indictment here charged a restraint which is beyond the scope of the Sherman Act. As we have stated, the purpose and intent of the defendants' activities here were to exclude Anheuser-Busch from the interstate market. The exclusion of a trader from the market, or the erection of arbitrary barriers to free access to the market, has long been recognized both under the Sherman Act and at the common law as a restraint of trade.

At the common law a contract or combination which denied to an individual fair and free access to the market was one of the classic forms of restraint of trade, and this was so regardless of whether the contract or combination attempted at the same time to fix prices or to restrict produc-

tion.[4] In the common law cases this doctrine often appeared in the form of declarations against artificial restrictions which prevented men from pursuing their lawful callings. See *Darcy* v. *Allein*, 11 Coke 84b; *The Case of the Tailors of Ipswich*, 11 Coke 53a; *Colgate* v. *Bacheler*, Cro. Eliza. 872; *Mitchel* v. *Reynolds*, 1 P. Wms. 181 (1711).[5] It is apparent from these declarations that the evil of denying access to the market was regarded as distinct from, although perhaps not entirely unrelated to, the evil of artificially controlled prices and production.[6]

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[4] That the common law meaning of the words "restraint of trade" may be used as a guide in construing the Sherman Act is shown by *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, where this Court, speaking of the enactment of the Sherman Act, said (p. 498):

"* * * the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states."

[5] For example, in *The Case of the Tailors of Ipswich*, *supra*, at 53b, the court said: "* * * at common law no men could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil * * * and the common law abhors all monopolies which prohibit any from working in any lawful trade, * * *."

[6] This is indicated by the fact that in the common law cases the courts, in explaining the basis for the rule against restraints of trade, usually classify the evil of exclusion from the market and the evil of artificially raised prices as separate and distinct grounds. See, for example, *Darcy* v. *Allein*, *supra*; *Mitchel* v. *Reynolds*, 1 P. Wms. 181 (1711),

In this connection it should be noted that the earliest common law rules as to restraint of trade were developed in relation to contracts by which a trader voluntarily surrendered the right to access to the market. See for example *Anon.*, Moore (K. B.) 115, 72 Eng. Repr. 477; *Anon.*, 2 Leo. 210, 74 Eng. Repr. 485. The limitations upon contracts of this kind were clear manifestations of the reluctance of the common law to sanction the placing of artificial barriers between the traders or the worker and the market. It is true that as time went on the common law rules against these restraints were relaxed so as to permit their imposition if they were not unreasonable, but this relaxation did not proceed from any admission that the restrictions did not restrain trade. It provided, rather, a limited justi-

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particularly at page 190; and *Alger* v. *Thacher*, 19 Pick. 51 (1831). Compare Judge Taft's summary of the early law in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6th), which reads in part as follows (p. 279):

"From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others."

fication for an admitted restraint.[7] It is apparent from the very nature of these rules that their application did not depend upon the existence of a contract to fix prices or to control production. The evil prohibited was the erection of arbitrary and unreasonable restrictions upon access to the market. It is also apparent that the common law regarded these restrictions as illegal irrespective of whether they resulted from agreements between competitors. The evil condemned was arbitrary interference with the pursuit of a lawful calling; the source of and the motive for the interference were both immaterial.[8]

That this common-law doctrine still possesses vitality is shown by a more recent English decision in a somewhat different field. In *Pratt* v. *British Medical Association* [1919] 1 K. B. 244, the defendant medical association had established certain

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[7] In this connection it is significant to note that in *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 191–192, the court held that the onus of proof that a restriction of this kind is reasonable rests upon the party who seeks to enforce it.

[8] This is the clear inference from the statements as to the basis of the rules contained in the common law cases (see note 6, p. 48 *supra*). It should be remembered that at the time when these rules developed the conception of competition as a regulating force in the market did not occupy the central position in economic thought which it subsequently assumed. The moral right of each man to exercise the privileges incident to his status and the social desirability of permitting him to do so, rather than an interest in commercial competition, appears to have been the starting point for the doctrine.

"rules of ethics," designed to obstruct so-called "contract practice." The action was in tort for damages. In holding for the plaintiff, the court said (p. 274):

> The public interests must be regarded conjointly with the interests of individuals when restraint of trade is in question. * * * Upon considering the rules in question I have arrived at the conclusion that they are *in restraint of trade,* and are void on the ground of public policy. They gravely, and in my view unnecessarily, *interfere with the freedom of medical men in the pursuit of their calling,* and they are, I think, *injurious to the interests of the community at large.* [Italics supplied.] [9]

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[9] It is interesting to compare the recent decision by the Court of Appeals for the District of Columbia in *United States* v. *American Medical Ass'n*, 110 F. (2d) 703 (1940), certiorari denied, 310 U. S. 644. The court applied common-law principles in holding a similar combination to be in restraint of trade within the Sherman Act. The court said (p. 713):

"It certainly cannot be doubted that Congress intended to exert its full power, in the public interest, to set free from unreasonable obstruction the exercise of those rights and privileges which are a part of our constitutional inheritance, and these include immunity from compulsory work at the will of another, *the right to choose an occupation, the right to engage in any lawful calling for which one has the requisite capacity, skill, material, or capital, and thereafter the free enjoyment of the fruits of one's labors.* Congress undoubtedly legislated on the common-law principle that every person has individually, and that the public has collectively, a right to require the course of all legitimate occupations in the District of Columbia to be free from unreasonable ob-

The debates in Congress preceding the passage of the Sherman Act contain references to restraints of trade which deny access to the market and thus prevent men from following their lawful callings, as well as to combinations to fix prices and to control production. For example, in introducing the bill Senator Sherman made the following statement (21 Cong. Rec. 2457):

> It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundations of the equality of all rights and privileges.

It is true that the greater number of the decisions of this Court interpreting and applying the Sherman Act have involved arrangements designed to limit production or to fix prices. Nevertheless, in a number of instances, not involving labor unions, this Court has struck down restraints not because they controlled prices or production but because they operated to destroy free access to the market. Striking examples of decisions of this

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structions, and likewise in recognition of the fact that all trades, businesses and professions, which prevent idleness and exercise men in labor and employment for the benefit of themselves and their families and for the increase of their substance, are desirable in the public good and any undue restraint upon them is wrong and is immediate and unreasonable and, therefore, within the purview of the Sherman Act." (Italics supplied.)

kind are *Paramount Famous Corp.* v. *United States,* 282 U. S. 30; and *United States* v. *First National Pictures, Inc.,* 282 U. S. 44. In those cases the Court held illegal certain contractual arrangements whereby producers of practically all of the motion picture films produced in the United States agreed among themselves to deal with exhibitors of those films only upon certain specified terms and conditions. There was no showing that the arrangements served to fix prices or to restrict production. Nevertheless, this Court held that the agreements were illegal because they denied the exhibitors access to the market unless they complied with the terms and conditions specified by the defendants.

The decision in *Eastern States Lumber Ass'n* v. *United States,* 234 U. S. 600, illustrates the same principle. There retailers of lumber combined to prevent wholesalers from selling direct to consumers. To achieve this purpose the defendants circulated "blacklists" of wholesalers who sold direct to consumers. There was no showing that the defendants had agreed among themselves as to prices, or that wholesalers sold to consumers at prices lower than those charged by the defendants. Nevertheless, this Court held that this was an illegal restraint of trade because it denied the wholesalers access to the retail market.

That restrictions upon access to the market are as much restraints of trade as are agreements

among competitors to fix prices or to limit production was also recognized by implication in the *Apex* decision. For example, in speaking of the purpose of the Sherman Act, the Court said (p. 493):

> The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices *or otherwise control the market to the detriment of purchasers or consumers of goods and services,* all of which had come to be regarded as a special form of public injury. [Italics supplied.]

And again the Court said (pp. 500–501):

> Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market *or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.* [Italics supplied.]

It is plain from this language that the Court did not confine its condemnation to agreements to fix prices or to control production or even to agreements made between competitors. Each of these statements recognizes that there may be other restraints equally within the scope of the statute. Certainly practices and activities which deny traders access to the market and thus impair their power to compete are included because they tend

to deprive purchasers and consumers of the advantages which are assumed to follow from free competition.

The defendants may contend that they have not restrained trade either because their purpose has not been to suppress competition or because the persons whose trade has been restrained are not competitors of the defendants. There is no merit in either of these arguments. Admittedly the activities of the defendants here were not prompted by a desire to escape the consequences of commercial competition in the usual sense. This circumstance should not serve to obscure the fact, equally true, that they intended to close the interstate market to Anheuser-Busch and to prevent others from dealing with it, and thus to impair or destroy its power to compete in the interstate market. Admitting, however, that the ultimate objective of the defendants here was to prevail in the jurisdictional dispute with the Machinists' Union, it does not follow that their activities did not restrain trade. If activities in fact affect the interstate market and suppress competition, they may fall within the scope of the statute even though their ultimate purpose may lie in other fields. This principle is recognized in the *Apex* opinion, where, in speaking of the decisions in *Loewe* v. *Lawlor,* 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; and *Bedford Cut Stone Co.* v. *Journeymen*

Stone Cutters Ass'n, 274 U. S. 37, this Court said (pp. 506–507):

> That the objective of the restraint in the boycott cases was the strengthening of the bargaining position of the union and not the elimination of business competition—which was the end in the non-labor cases—was thought to be immaterial because the Court viewed the restraint itself, in contrast to the interference with shipments caused by a local factory strike, to be of a kind regarded as offensive at common law because of its effect in curtailing a free market and it was held to offend against the Sherman Act because it effected and was aimed at suppression of competition with union-made goods in the interstate market.

The same principle is illustrated by an earlier decision of this Court in a case somewhat more analogous to the case at bar: *United States* v. *Painters' District Council No. 14*, 44 F. (2d) 58 (N. D. Ill.) affirmed *per curiam* after a full hearing, 284 U. S. 582. In that case a painters' union in Chicago conspired to prevent the use or installation in Chicago of cabinet work painted in factories located in states other than Illinois. Some of the cabinet work which the defendants intended to exclude from the Chicago market was painted in Kentucky by members of another union. The purpose of the restraint was to obtain for the defendants the exclusive right to paint all cabinets installed in Chicago, a purpose comparable in many

ways to the purpose of the defendants here to obtain for the carpenters' union the exclusive right to install and repair machinery. The district court held that this restraint violated the Sherman Act and that decision was affirmed by this Court. No issues as to price fixing or restrictions upon production were involved; the restraint fell within the scope of the Act merely because it denied free access to the Chicago market to products painted outside of the State of Illinois, and thus deprived consumers and purchasers of the benefits which normally flow from the maintenance of a free market. Thus the restriction had the effect of suppressing competition in the interstate market even though the defendants' purpose may not have been immediately directed to this end. The analogy to the facts at bar is close and persuasive.

It is also immaterial that the defendants were not commercial competitors of Anheuser-Busch or of the other companies whose trade they restrained, or (except in a very loose sense) of the Machinists' Union with whom they were quarreling. It is perfectly clear from the decisions of this Court that a restraint may fall within the prohibited area even though it is not imposed upon the commerce of a competitor. See the discussion of *Loewe* v. *Lawler*, 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n*, 274 U. S. 37, contained in the opinion in *Apex Hosiery Co.* v. *Leader*

(see p. 56, *supra*). In the *Second Coronado Case*, 268 U. S. 295, the restraint condemned did not operate against commerce carried on by commercial competitors of the defendants. An example from another field is found in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, where this Court struck down a restraint imposed by the defendant upon jobbers of gasoline who were not competitors of the defendant in any sense.

IV

THE INDICTMENT CHARGES AN UNREASONABLE RESTRAINT OF TRADE

There remains the question whether the restraint charged in the indictment may be justified under the "rule of reason" enunciated in *Standard Oil Co.* v. *United States*, 221 U. S. 1. A cursory examination of the character and consequences of jurisdictional strikes makes clear the answer.

It is generally admitted that the right of labor to unionize a plant in order to maintain collective bargaining is so intimately connected with the attainment of labor objectives that the fact that nonunion laborers are directly injured, or the commerce of the employer interrupted, does not make a strike to achieve unionization, such as that involved in the *Apex* case, an unreasonable restraint of trade. But such an objective is very different from an intent, not to unionize, but to deprive members of another union of their employment.

It is difficult to imagine any form of labor warfare so opposed to the public interest and to the interest of organized labor as the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor. William A. Green, President of the American Federation of Labor, on September 28 of last year, attacked jurisdictional strikes as representing "the rule of force and might."[10] Other intelligent labor leaders have similarly condemned this type of labor warfare.[11] The reasons are obvious, whether looked at from the standpoint of the employer or of the union. An employer who finds himself the victim of such a strike is powerless to remedy the situation. There is no concession he can make which will stop the attack on his business. Similarly, the union whose relations with the employer the other union seeks to disrupt cannot rely on its satisfactory service or its superior craftsmanship to maintain its position; it has no weapon, other than ruthless economic warfare, to defend itself against the aggressive tactics of those who would destroy it.

Certainly the cause of intelligent collective bargaining is not served by union expansion through

[10] See New York Times, September 29, 1939, p. 46.

[11] See statement of John P. Coyne, President of the Building and Construction Trades Department of the American Federation of Labor, in the New York Times for August 12, 1939, page 1. See also the statement of Thomas A. Murray, President of the New York City Building and Construction Trades Council, in the New York Times for August 17, 1939, page 23.

the type of coercive tactics charged to the defendants here. American policy is to encourage the growth of unions. If these unions grow with the efficiency and ability of their leaders in gaining advantages for labor, good union leadership may be expected. But if a union is permitted to expand through the mere brutal use of power against neutral employers, there will be a premium on ruthless and coercive leadership. Consequently, it is essential to the growth of an intelligent labor movement that competing unions should not succeed or fail solely with reference to their ability to bring pressure against each other.

If force is once established as the recognized mode of competition between labor organizations, and the power of such an organization is permitted to be expanded by stopping the interstate business of every employer who deals with another union, there is no possible help for forward-looking labor leaders who desire to clean their own houses. Of course, disputes will arise between industrial unions and craft unions, and between craft unions themselves (as in this case), as to which will be permitted to do a certain type of work. In the same way, there will be disputes between the subsidiaries of the United States Steel Corporation as to which one will serve a particular customer. But it is difficult to conceive how the objectives of the United States Steel Corporation would be furthered by allowing the Illinois Steel Company to

destroy the business of any customer who dealt with Carnegie Illinois Steel Company. Similarly, it is difficult to conceive how the objectives of intelligent unionism would be furthered by allowing one union to destroy the commerce of any employer who deals with a competing union. Such a power to restrain trade is one which no government can safely put in the hands of any private group.

At the beginning of the road of restraints of trade is competition through force and coercion instead of through efficiency and service. At the end of that road is the monopoly that results after those most skilled in the use of force have conquered those who were mistakenly trying to gain a place for themselves by efficiency and service. If the Sherman Act is, as this Court has said, a charter of freedom (see *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359), it must include within its prohibitions the destruction of one labor organization by another through force and coercion at the expense of innocent bystanders and the tying up of the business of the public at large.

V

THE COURT BELOW ERRED IN HOLDING THAT THE SHERMAN ACT DID NOT APPLY TO THE ACTS CHARGED IN THE INDICTMENT BECAUSE OF THE PROVISIONS OF THE NORRIS-LA GUARDIA ACT

One more point must be noted. The court below held that the allegations of the indictment relating

to the nation-wide boycott of Anheuser-Busch beer and of dealers in that beer "set forth an attempt to interfere with the interstate commerce in that product." The court concluded, however, that the "means" used to conduct the boycott were not unlawful,[12] and that "labor unions engaging in jurisdictional strikes are immune from suit in the federal courts, so long as lawful means are employed, under the provisions of the Norris-LaGuardia Act of 1932, enlarging the scope of section 20 of the Clayton Act" (R. 20).

The view that the Norris-LaGuardia Act (c. 90, 47 Stat. 70, 29 U. S. C., § 101 *et seq.*) modified or amended Section 1 of the Sherman Act so as to make lawful thereunder activities which might otherwise be illegal is plainly erroneous. That statute does nothing more than limit the equity powers of the federal courts. Its purpose and scope are shown by its first section, which provides (47 Stat. 70, 29 U. S. C. § 101):

> No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act;

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[12] In holding that the "means" employed were lawful, the court below apparently meant that the boycott was not accompanied by acts of physical violence or by threats of violence. This fact is immaterial. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513.

> nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

The purpose thus declared is carried out by the other provisions of the Act which prescribe terms and conditions to be followed by the federal courts in issuing and enforcing injunctions in cases arising out of labor disputes. Nothing in the Act purports to change the existing substantive rules of criminal and civil law as they apply to the activities of labor organizations.[13] This conclusion as to the purpose of the Act is confirmed by its legislative history. The reports of the congressional committees and the debates on the floor of Congress show that the Act was directed at nothing more than the equity powers of the federal courts.[14]

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[13] The situation as to the criminal law is too plain to require elaboration. It may be suggested that by reason of its denial of the injunctive remedy the law changes the substantive rights of one who seeks relief in a court of equity. On the other hand, there is much to be said for the view that for the most part the Act simply embodies the sound view as to the equity practice prevailing before its enactment. The only section of the Act which might properly be regarded as impairing substantive rights is Section 3, which outlaws the so-called "yellow dog" contract. It has never been suggested that the Norris-LaGuardia Act modifies in any way Section 7 of the Sherman Act, which confers a civil right to triple damages.

[14] In both the Senate and the House the bill finally enacted was entitled "a bill to define and limit the jurisdiction of courts sitting in equity." For explicit statements as to the

The same reasoning which supports the conclusion that the Norris-La Guardia Act does not expressly amend Section 1 of the Sherman Act closes the door on any possible argument that an amendment is accomplished by inference or implication. Moreover, "It is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Company,* 308 U. S. 188, 198. In that case it was argued that the Sherman Act had been modified by the passage of the Agricultural Marketing Agreement Act of 1937. This Court rejected the contention, pointing out, among other things, that (p. 199):

> The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner.

Similarly here it is obvious that the Norris-La Guardia Act is a limited statute passed with specific reference to the exercise of a particular kind of jurisdiction by the federal courts. It affords

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purpose of the bill see the Senate report at pages 7–8 (S. Rep. No. 163, 72d Cong., 1st Sess.). Similar statements appear in the House report at pages 2–3 (H. Rep. No. 669, 72d Cong., 1st Sess.). If it were necessary to resort to statements made in the debates on the bill, additional support for this conclusion could be supplied. See 75 Cong. Rec. 5467, 5464.

no ground for construing the Sherman Act as inapplicable to the acts charged in the indictment.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

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NOVEMBER 1940.

APPENDIX

Section 1 of the Sherman Act, as amended, c. 647, 26 Stat. 209, c. 690, 50 Stat. 693, 15 U. S. C. § 1, is as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful

any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Clayton Act, as amended, c. 323, 38 Stat. 730, 15 U. S. C., § 17 and 29 U. S. C. § 52, is as follows:

SEC. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

* * * * *

SEC. 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between

persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Those provisions of the Norris-La Guardia Act, c. 90, 47 Stat. 70, 29 U. S. C., §§101–115, which might possibly be deemed relevant are as follows:

> SEC. 1. No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.
>
> SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in

self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

* * * * *

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrol-

ling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

* * * * *

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be

continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

* * * * *

SEC. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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No. 43

IN THE

Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA,

Plaintiff,

against

WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN and JOSEPH AUGUST KLEIN,

Defendants-Appellees.

MOTION TO DISMISS APPEAL
and
STATEMENT AGAINST JURISDICTION

JOSEPH O. CARSON, II,
THOMAS E. KERWIN,
MUNRO ROBERTS,
JOSEPH O. CARSON,
BRYAN PURTEET,
CHARLES H. TUTTLE,
Counsel for Defendants-Appellees.

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IN THE

Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA,

Plaintiff,

against

WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN and JOSEPH AUGUST KLEIN,

Defendants-Appellees.

MOTION TO DISMISS APPEAL

FILED APRIL 15, 1940

Now come William L. Hutcheson, George Casper Ottens, John A. Callahan and Joseph August Klein, the defendants-appellees herein, by their attorneys, and move this Court to dismiss, with costs, the appeal taken herein to this Court by the United States of America upon the following grounds:

1. The statute relied on by the United States of America to sustain the appellate jurisdiction of this Court, *i. e.*, Title 18, U. S. C. § 682, Act of March 2, 1907, c. 2564, 34 Stat., 1246, as amended, otherwise known

as the Criminal Appeals Act, is not applicable to this cause.

2. This Court has no jurisdiction under any statute of the United States to hear and determine said appeal.

Dated: April 13, 1940.

JOSEPH O. CARSON, II,
THOMAS E. KERWIN,
MUNRO ROBERTS,
JOSEPH O. CARSON,
BRYAN PURTEET,
CHARLES H. TUTTLE,
Counsel for Defendants-Appellees.

IN THE

Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA,

Plaintiff,

against

WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN and JOSEPH AUGUST KLEIN,

Defendants-Appellees.

STATEMENT AGAINST JURISDICTION

In compliance with Rule 12, Paragraph 3 of the Supreme Court of the United States, as amended, defendants William L. Hutcheson, George Casper Ottens, John A. Callahan and Joseph August Klein, by their attorneys, file this statement of matters or grounds making against the jurisdiction of the Supreme Court of the United States to review upon direct appeal from the Federal District Court the judgment entered in this cause:

The United States seeks to appeal direct to this Court from a judgment of the Federal District Court sustaining the separate demurrers of these defendants to the indictment filed herein. As ground for direct appellate jurisdiction in this Court, it asserts that the said judgment is

based upon the construction of Section 1 of the Sherman Anti-Trust Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. Sec. 1) within the meaning of the Criminal Appeals Act (Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. Sec. 682). As a further ground, it suggests that the sustaining of the separate demurrers of the defendants herein amounts to the sustaining of a "special plea in bar, when the defendant has not been put in jeopardy" within the meaning of the said Criminal Appeals Act.

For the clear and well established reasons set forth below, defendants assert that the judgment by the Federal District Court is not, as contended by the United States, predicated on the grounds necessary to bring it within the provisions of the Criminal Appeals Act. Accordingly, we respectfully submit that this Court has not jurisdiction of a direct appeal in this cause.

I. The judgment of the District Court was not "based" upon a construction of the Sherman Act.

The mere fact that the District Court sustains a demurrer on the ground that the allegations of the indictment are insufficient to charge a crime under a Federal statute is not in itself any basis for a direct appeal to this Court.

All Federal crimes are statutory; but every determination that a given set of facts set forth in an indictment does not constitute a crime does not create a judgment "*based* upon the construction of the statute."

The meaning of the statute may have become so well settled by judicial decision, or may be so clear from the language used, or may be so absent from the issues debated that the judgment of the Court is not based upon the construction of the statute but is based solely upon

the construction of the indictment. In other words, the judicial process by which is reached the determination that the indictment is insufficient in point of fact may not involve any consideration or adjudication concerning the choice of constructions to be put upon the Act, but only a consideration and an adjudication of the sufficiency of the acts alleged to constitute the crime charged. To illustrate, a determination that an indictment which did not mention interstate commerce did not state a crime under the Sherman Act would clearly not involve the judicial process with problems of construction of the Sherman Act.

Such is this case. The District Court has not attempted to make a choice between different constructions of the Sherman Act proposed by the respective parties. The District Court merely takes the Sherman Act as it stands and the principles which have become axiomatic through repeated decisions of this Court.

All that the District Court has really done is to say that in the light of these axiomatic and settled principles the pleading is bad as a pleading, to wit, it fails to set out a crime. To quote the opinion of Judge DAVIS:

> "In order to charge the defendants with the commission of a crime under the Sherman Act, the indictment must not only allege sufficient facts to show a conspiracy to cause a direct restraint upon interstate commerce, as distinguished from a remote or incidental restraint (*Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 55 S. Ct. 37, 79 L. Ed. 1570; *Levering & Garrigues Company* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062), but must also show that defendants' activities were unlawful, outside the scope of the legitimate objects and means that may be sought and employed by labor unions under the sanction of the Clayton Act (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349)."

No choice of constructions of the Sherman Act is involved in these statments. The statements themselves are elementary and axiomatic, thoroughly established by repeated decisions of this Court. In other words, Judge Davis was not construing the Act, but merely predicating himself on certain principles which this Court has definitely settled. Against these axiomatic principles Judge Davis has measured the factual statement in the indictment and has found it clearly wanting. In other words, it was not the statute which was weighed but the facts; and the Court's conclusion was thus stated:

> "This is alleged to be a criminal case. The indictment should set forth facts which if proved would constitute a crime. *That this indictment does not do.*" (Italics ours.)

We submit that there could be no clearer statement that the Court was merely construing the indictment and not the statute. To say, as does Judge Davis, that the "allegations in the indictment * * * fail to allege" a direct restraint of interstate commerce and show a restraint which "is only incidental", is not placing a construction on the Sherman Act but only pointing out wherein the facts alleged fall short of the settled standards of criminality. So likewise, to say, as does Judge Davis, that the facts alleged show that the purpose of the defendants "was not to restrain commerce, but to prevail in a local labor controversy", is to base the decision upon the allegations and not upon the construction of the Act. Indeed, that statement does not even involve a construction of the allegations, but merely recognition that they not merely omit but actually negative facts essential to criminality.

II. Moreover, jurisdiction cannot in any event be made out because the judgment is predicated on an independent non-appealable ground.

The United States, on the authority of *U. S.* v. *Borden Company, et al.*, 308 U. S. , 60 S. Ct. 182, contends that what it asserts to be construction by Judge DAVIS of the Clayton Act (15 U. S. C. Sec. 17) and the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. Sec. 101-115) necessarily constitutes construction of Section 1 of the Sherman Act. The defendants cannot agree that Judge DAVIS has construed the latter acts. But assuming for the purposes of this statement that he has, this Court will not take jurisdiction of this appeal if the judgment below was predicated also on an independent, non-appealable ground, *i. e.*, the construction of the indictment.

> *United States* v. *Hastings*, 296 U. S. 188;
> *United States* v. *Borden Company, et al.*, 308 U. S. , 60 S. Ct. 182.

This Court summarizes this principle in the *Hastings* case as follows:

> "A distinct question is presented where the District Court has not placed its decision solely upon the invalidity or construction of the statute, but also has sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency. In such a case the judgment of the District Court would remain in effect, and the defendant would go free of the indictment, whatever views we might express upon appeal as to the construction or validity of the statute. We could not reverse the judgment upon questions not before us. An indictment not merely attacked, but found to be invalid on grounds not open here, would be made the vehicle of

> an effort to obtain from this Court an expression of an abstract opinion, which might or might not fit a subsequent prosecution of the same defendant or others but would not determine the instant case. Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly."

And this principle is expressly recognized in the *Borden* case.

The independent, non-appealable ground upon which Judge DAVIS sustained the separate demurrers of these defendants is the failure of the indictment to allege sufficient facts to satisfy the statutory requirements heretofore stablished by this Court and universally accepted as the *sine qua non* of valid criminal pleading under the Sherman Act. Where such failure occurs, this Court is without jurisdiction.

> *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87;
> *United States* v. *New South Farm & Home Co.*, 241 U. S. 64;
> *United States* v. *Oppenheimer*, 242 U. S. 85, 86.

And where the District Court opinion is predicated as much upon the construction of the indictment as upon the construction of the statute, this Court is without jurisdiction.

> *United States* v. *Carter*, 231 U. S. 492;
> *United States* v. *Moist*, 231 U. S. 701.

Thus it has become quite customary, in view of the duty upon the United States affirmatively to show that construction of the statute is involved, for the District Court

judge to certify whether or not his decision was predicated on the construction of the statute.

United States v. *Chavez*, 228 U. S. 525;
United States v. *Flores*, 289 U. S. 137;
United States v. *Hastings*, 296 U. S. 188;
United States v. *Halsey, Stuart & Co.*, 296 U. S. 451.

In the present case, the United States has obtained no such certification.

Against the backdrop of these authorities, Judge DAVIS' opinion in the present cause should be viewed. He has given no new meaning to Section 1 of the Sherman Act. He has employed the meaning which prior judicial construction has made definite and certain. Clearly a direct restraint on interstate commerce must be alleged. But, as Judge DAVIS points out (p. 4), only an incidental restraint has actually been alleged:

> "Allegations in the indictment concerning the activities of defendants in picketing the premises of Anheuser-Busch, Inc. and Gaylord Container Corporation, as well as the refusal to allow their members to be employed by Borsari Tank Corporation and L. O. Stocker Company, fail to allege a conspiracy to directly restrain interstate commerce; the restraint on commerce shown by such allegations is only incidental. *Levering & Garrigues Company* v. *Morrin, supra; United Leather Workers* v. *Herkert & Meisel*, 265 U. S. 457; *Industrial Association* v. *United States*, 268 U. S. 64; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Leader* v. *Apex Hosiery Company* (C. C. A., 3rd, 1939), 108 Fed. (2d) 71.
>
> "The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy. The Congress has not declared that a dispute of the nature alleged is unlawful. By the indictment it is sought to punish

> the defendants for what is conceived to be an unwarranted interference with a local industry, under the pretense that by the dispute interstate commerce was restrained."

His conclusion therefrom is inevitable, that, wholly apart from construction of the Clayton and Norris-La Guardia Acts, the indictment is deficient as a pleading. It lacks the essential criminal allegations of intent directly and unreasonably to restrain interstate commerce. No matter what construction of the Sherman Act may be taken, the allegations in the indictment herein, in the view of Judge DAVIS, do not amount to the facts necessary to charge a crime under that act. As the court in *United States* v. *Denison*, 47 F. (2d) 433 says so clearly at page 436:

> "This right to proceed by error to the Supreme Court, however, only lies where the validity or construction of the statute is involved. No such question here arises, since we are dealing solely with the sufficiency of the indictment to charge a crime under the statute. Besides, the validity and construction of this statute has been so often upheld by the courts as to wholly deprive a defendant of the right to proceed on either of the grounds provided. Where the construction of a statute and its validity have been adjudicated, the right to proceed by writ of error from a District Court to the Supreme Court on either of these grounds will no longer be recognized."

III. Jurisdiction cannot be made out on the ground that the judgment of the District Court sustained a plea in bar within the meaning of the Criminal Appeals Act.

The United States suggests that the jurisdiction of this Court "may be sustained on the ground that the judgment of the District Court is one sustaining a special

plea in bar, when the defendants have not been put in jeopardy." In support thereof it cites five decisions of this Court, in none of which a *demurrer* was involved and in three of which it was merely decided that a plea of the Statute of Limitations is a plea in bar.

This contention ignores the fundamental difference between a plea in bar and a demurrer. The former presents an issue of fact. A demurrer always presents an issue of law.

As the Court said in *United States* v. *Storrs,* 272 U. S. 652:

> "The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense."

In neither a technical nor a liberal sense has a demurrer questioning the sufficiency in law of the facts charged ever been held to be a "special plea in bar" within the meaning of the Criminal Appeals Act.

But the United States' attempted characterization of the demurrers in this cause as pleas in bar becomes groundless upon a reading of the very statute under which it hopes to bring the judgment of the court below. The Criminal Appeals Act specifically provides in its second paragraph that direct appeal from a sustained *demurrer* lies only "where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." On the other hand that Act provides that direct appeal from a "special plea in bar, when the defendant has not been put in jeopardy" lies in all cases. If, as the United States suggests, a demurrer is a special plea in bar it would be unnecessary for this Court to consider whether the invalidity or construction of the statute grounds the District Court's judgment.

Appeal would lie in all cases,—and the provision in the Criminal Appeals Act with regard to demurrers would be emasculated.

It cannot presently be assumed that this Court has for thirty-three years mistakenly construed the Criminal Appeals Act to mean what it says. On no such tenuous grounds can the jurisdiction of the United States Supreme Court be rested.

Respectfully submitted,

JOSEPH O. CARSON, II,
THOMAS E. KERWIN,
MUNRO ROBERTS,
JOSEPH O. CARSON,
BRYAN PURTEET,
CHARLES H. TUTTLE,
Counsel for Defendants-Appellees.

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IN THE

Supreme Court of the United States

October Term, 1940

THE UNITED STATES OF AMERICA,
Appellant,

against

WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN and JOSEPH AUGUST KLEIN,
Appellees.

No. 43

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE APPELLEES

CHARLES H. TUTTLE,
BRYAN PURTEET,
JOSEPH O. CARSON,
THOMAS E. KERWIN,
JOSEPH O. CARSON, II,
Counsel for Appellees.

December, 1940.

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IN THE

Supreme Court of the United States

October Term, 1940

THE UNITED STATES OF AMERICA, *Appellant,* *against* WILLIAM L. HUTCHESON, GEORGE CASPER OTTENS, JOHN A. CALLAHAN and JOSEPH AUGUST KLEIN, *Appellees.*	No. 43

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE APPELLEES

This is an appeal direct to this Court under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended, 18 U. S. C. § 682, commonly known as the Criminal Appeals Act, and under § 238 of the Judicial Code as amended, from a decision by the District Court of the United States for the Eastern Division of Missouri sustaining the separate demurrers of the defendants (R. 13-16) to an indictment (R. 1-12) charging them with violation of Section 1 of the Sherman Act, as amended (c. 647, 26 Stat. 209, 15 U. S. C. § 1).

The opinion of the District Court (R. 17-22) is reported in 32 F. Supp. 600.

The order of the District Court dismissing the indictment was entered on April 1, 1940 (R. 22). On the same day an order was made allowing an appeal (R. 25-6).

Statute Involved

The indictment is based on Section 1 of the Sherman Act, as amended (c. 647, 26 Stat. 209, 15 U. S. C. § 1).

This statute is set forth in the appendix to the Attorney-General's brief, pages 67-72.

Question Presented

Does the indictment state facts constituting a violation of Section 1 of the Sherman Act?

The Indictment

The appellant's brief concedes that the charge in the indictment grows "out of a jurisdictional controversy between two rival unions" over certain construction work in the local plant of the Anheuser-Busch Company in St. Louis, Mo. (pp. 5-7). The claim is that "the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor" is a violation of Section 1 of the Sherman Law (p. 59).

In the indictment there is no allegation that the defendants have indulged in violence, threats of violence, trespass against property, or criminal acts (other than the so-called "conspiracy").

There is no allegation that the labor organization has been "used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices"—to quote the *Apex* decision (310 U. S. 469, 501).

There is no allegation of any intent "to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market"—again to quote the *Apex* decision (p. 497).

There is no allegation that the alleged activities of the abor organizations had any object other than "to enforce heir demands against the employer" as to certain future vork in its plant in St. Louis—again to quote the *Apex* lecision (p. 487).

There is no allegation that the activities of the labor organizations alleged to have affected interstate commerce "were directed at control of the market and were so widespread as substantially to affect it"—again to quote the *Apex* case (p. 506).

We are thus particular in calling attention to what the ndictment does *not* allege because the appellant's brief ttempts to write into it much that is not really there. By the use of such opprobrious terms as "ruthless economic warfare", "aggressive tactics", "brutal use of power", "secondary boycott", "force", "coercion", "nation-wide", etc., the appellant's brief attempts so to nflate with words the simple episode of a local labor conflict told in this indictment as to balloon it above the levastating effect of the *Apex* decision, rendered since the rder appealed from was made.

The indictment tells this very simple story:

The Anheuser-Busch Company, in February, 1939, submitted to the Borsari Tank Corporation a proposal for he construction "of an additional tank building" on its premises in St. Louis; and, in July, 1939, contracted with Borsari for its erection (par. 15).

The Gaylord Container Corporation was lessee from he Anheuser-Busch Company of a portion of those premses. In August, 1939, it contracted with the L. O. Stocker Company for the erection of "an additional office building n the premises" (pars. 16, 18). Since such additional uilding would be on the land of the Anheuser-Busch Company it would belong to that company on erection and evert to it at the end of the lease.

The proposed erection of the "additional tank building" brought contention in the Anheuser-Busch plant between the millwrights and machinists employed in the plant, through their respective labor organizations, over the jobs in erecting, assembling and installing certain machinery in the "construction being performed and about to be performed for Anheuser-Busch, Inc. by independent contractors including the construction of the proposed tank building about to be performed by Borsari Tank Corporation of America" (par. 29).

Anheuser-Busch refused the request of the millwrights for this work, and on April 15, 1939, made a one-year contract with the machinists awarding all this work exclusively to them (par. 21). Thereupon the labor union to which the millwrights belonged, to wit: the Carpenters District Council of St. Louis, which was the local organization of the United Brotherhood of Carpenters and Joiners of America, did the following things:

1. "Called a strike of the millwrights, carpenters and cabinet makers in the plant" on June 28, 1939 (par. 31).

2. "Caused the premises of Anheuser-Busch, Inc. in the city of St. Louis, Missouri", including the portion thereof occupied by the Gaylord Container Corporation, "to be picketed by persons bearing umbrellas and charging Anheuser-Busch, Inc. to be unfair to organized labor" (par. 31).

3. Refused to work for Borsari Tank Corporation on the "construction of the tank building", and refused to work for the L. O. Stocker Company on "the construction of an additional office building for Gaylord Container Corporation" on the premises of the Anheuser-Busch Company (pars. 33, 34).

4. Published in "The Carpenter", an official periodical publication of the United Brotherhood, a notice "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing

and drinking said beer'' (par. 32). Like announcement was made to other trade unions affiliated with the American Federation of Labor (par. 32).

The indictment alleges that ''the object and purpose'' of this union activity were to induce the Anheuser-Busch Company

> ''to employ millwrights of United Brotherhood of Carpenters and Joiners of America instead of machinists to perform the work of erecting, installing and setting of machinery'' (par. 28).

Neither the Local nor the National Carpenters Union is indicted. The only defendants are William L. Hutcheson, General President of the United Brotherhood; George Caspar Ottens, General Representative of the United Brotherhood; John A. Callahan, Secretary of the Carpenters District Council of St. Louis; and Joseph August Klein, Business Representative of that Council. The only specific charge against Mr. Hutcheson (as distinct from the general charge of conspiracy) is that on June 28, 1939, the other three defendants, at his ''direction'' and with his ''approval'', ''communicated an ultimatum to Anheuser-Busch, Inc.'' and ''called a strike'' (pars. 29, 31).

The indictment reflects the opinion of the pleader that the machinists had a better right than the millwrights to do this work in the additional tank building, but even its own language of advocacy does not conceal the fact that there could be and were two sides to the story (pars. 19-23).

The indictment does not allege that the long-standing dispute between the national organizations of the millwrights and the machinists over work of this character was maintained by the former in bad faith or without color of merit. The alleged agreement to arbitrate is not alleged to have applied to a matter of jurisdiction, particularly over new work and as to new jobs; and, in any event,

it had been nullified by the unilateral action of Anheuser-Busch on April 15, 1939, in awarding and contracting this work and these jobs exclusively to the machinists (par. 21). (See Point IX, p. 52, *post*.)

Of course, the indictment uses many more words than we have used in the above simple narrative. It endeavors by much language of opprobrium and by the lavish use of characterizations and conclusions, to give to this simple labor conflict in a single branch of work in a single local plant in St. Louis as monstrous an appearance as the reflection from a curved mirror.

The appellant's brief cites no decisions in any Federal Court (before or since the *Apex* case) holding that such *facts* as are alleged in this indictment constitute a crime under Section 1 of the Sherman Law. Rather the position of the appellant's brief seems to be that those facts *should* constitute a crime under *some* law, because (p. 60):

> "It is essential to the growth of an intelligent labor movement that *competing* unions should not succeed or fail solely with reference to their ability to bring pressure against each other." (Italics ours.)

This, we believe, is the first time that it has been suggested that the Sherman Law penalizes "competing"!

Certainly, an interpretation of the Sherman Law which penalizes competition for jobs but demands competition in goods is a new and anomalous conception. The anomaly is further high-lighted by the very *reductio ad absurdum* to which it ultimately drives the appellant's own brief, to wit: that it is not a crime under the Sherman Law to "strike to achieve unionization" by depriving non-union laborers of their employment, but it is such a crime to strive "to deprive members of another union of their employment" (p. 58). We leave it to the appellants to reconcile this extraordinary distinction with familiar constitutional guarantees and with their own quotation at

page 48 from a leading English case that "the common law abhors all monopolies which prohibit *any* from working in any lawful trade." (See Points II and VI, pp. 21 and 42, *post*.)

Decision of the District Court

The District Court in its opinion below measured the sufficiency of the indictment against two established criteria which it stated as follows (R. 18):

> "In order to charge the defendants with the commission of a crime under the Sherman Act the indictment must not only allege sufficient facts to show a conspiracy to cause a direct restraint upon interstate commerce, as distinguished from a remote or incidental restraint (*Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; *Levering & Garrigues Company* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062), but must also show that defendants' activities were unlawful, outside the scope of the legitimate objects and means that may be sought and employed by labor unions under the sanction of the Clayton Act. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 41. S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196."

Thus measured, the factual allegations of the indictment as to each and every activity of the defendants were held to show no offense against the Sherman Law.

With respect to such interference with commerce as may have resulted from these activities, the court held that the first criterion had not been met, because such interference (if any) was merely incidental, indirect and remote,—citing (R. 19):

> *Levering & Garrigues Company* v. *Morrin, supra; United Leather Workers* v. *Herkert & Meisel*, 265 U. S. 457;

Industrial Association v. *United States*, 268 U. S. 64;
United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344;
Leader v. *Apex Hosiery Company*, 3 Cir., 1939, 108 Fed. (2d) 71.

With respect to the alleged boycott of Anheuser-Busch beer, the court held that the second criterion had not been met, because (R. 20):

> "The means used by defendants are not shown to be unlawful. Publication of notices that Anheuser-Busch was unfair to organized labor and requests to withdraw patronage from the products of that company was a direct boycott, lawfully carried out. No secondary boycott of customers purchasing the company's products is disclosed."

With respect to the Attorney-General's contention that a "jurisdictional strike" is not one of "the legitimate objects" immunized by the Clayton Act, no matter how lawful the means employed, the court held to the contrary and also pointed out that the jurisdictional strike was immune (as long as the means employed were lawful) under the "Public Policy Declared" in, and under the other provisions of, the Norris-La Guardia Act of 1932, 29 U. S. C. A., Section 101 *et seq.*, enlarging the scope of Section 20 of the Clayton Act, 29 U. S. C. A., Section 52. In support of this view the Court cited (R. 20, 21):

New Negro Alliance v. *Sanitary Grocery Company*, 303 U. S. 552;
Lauf v. *E. G. Schinner & Company*, 303 U. S. 323;
Blankenship v. *Kurfman*, 96 Fed. (2d) 450 (C. C. A., 7th Ct.);
Terrio v. *S. N. Nielsen Construction Company*, 30 Fed. Supp. 77 (D. C. La., 1939).

Because of this civil immunity the Court said (R. 22):

"That which does not amount to a civil wrong can hardly be characterized as criminal."

The true nature of the so-called conspiracy was analyzed and epitomized by the Court when it said (R. 19):

"The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy. The Congress has not declared that a dispute of the nature alleged is unlawful. By the indictment it is sought to punish the defendants for what is conceived to be an unwarranted interference with a local industry, *under the pretense that by the dispute interstate commerce was restrained.*" (Italics ours.)

Summary of Argument

1. Implicit in the prosecution's case is the novel theory that when a local strike lessens temporarily and to some degree the movement of the employer's interstate commerce, the rights and wrongs thereof should not be left to the local laws and authorities, but should be policed by the Federal Government and should be determined by criminal prosecution under the Sherman Law. (See Point I, p. 13, *post.*)

This theory would bring nearly every defensive or offensive activity of organized labor under centralized governmental control; expose it to the sociological and economic conceptions prevailing for the time being in the Department of Justice; and reverse the public policy of this country as declared with increasing emphasis by Congress.

As said in the *Apex* case (310 U. S. 469, 512):

"These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the

> Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers'."

2. The appellant's condemnation of the "jurisdictional strike" on alleged social and economic grounds would be germane only in Congress and the State Legislatures. (See Points II and III, pp. 21 and 26, *post*.)

Whether or not Congress has the constitutional power to broaden the Sherman Act "to apply to all labor union activities *affecting* interstate commerce" (*Apex*, p. 489), it has left standing the broad and striking difference between the language of that Act and the reference in the Wagner Act to conduct "affecting" interstate commerce. It has never attempted to condemn labor activities as such, unassociated with illegal acts and planned and direct restraint "as the means or instrument for suppressing competition or fixing prices" (*Apex*, p. 501).

3. The procurement of employment is a "legitimate object" of a labor union, both at common law and under Sections 6 and 20 of the Clayton Act; and it is also part of and necessarily implied in the "mutual help" for which, under the Clayton Act and the Norris-LaGuardia Act, a labor union may have with immunity "existence and operation." (See Points IV, V and VI, pp. 33, 37 and 42, *post*.)

The fact that, as a result of such competition for employment, other laborers, whether organized or not, may not obtain (or even lose) jobs, is, as said by the Court of Appeals of New York in the leading case on jurisdictional strikes (*Stillwell Theatre* v. *Kaplan*, 259 N. Y. 405, 412): "conduct which is within the allowable area of economic conflict."

Indeed, such gains and losses by different individuals are the inevitable consequences of the competitive system itself, whether in goods or in services, and are part of the price which we pay for industrial freedom. A system which presupposes that centralized government can and must determine what activities of labor are "justified" would constitute not Democracy but Fascism.

4. The acts which are charged in this indictment as having been done by the defendants are among the very acts which are specified in Section 20 of the Clayton Act as not to be "considered or held to be violations of any law of the United States." (See Point V, p. 37, *post.*)

5. The acts which are charged in this indictment as having been done by these defendants fall under the protection of Section 2 of the Norris-LaGuardia Act (U. S. C. A, Title 29, Sec. 102) entitled "Public Policy in Labor Matters Declared," and also under the protection of Sections 4, 5 and 6 of that Act listing labor activities which no federal court may enjoin at the suit either of the Government or of private persons. (See Point V, p. 37, *post.*)

6. Whether or not this strike at the Anheuser-Busch premises in St. Louis violated anyone's rights at civil law, it neither was nor could be a crime under the Sherman Law "even though a natural and probable consequence of their [the strikers'] acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer" (*Apex,* p. 487). In point of fact such strike was not a restraint of trade at all, either at common law or under the Sherman Law. (See Point I, p. 13, *post.*)

7. Whether or not the labor organization violated anyone's rights at civil law by urging its members and the friends of labor to refrain from purchasing Anheuser-

Busch beer, such conduct was not criminal, either at common law or under the Sherman Act. Moreover, in point of fact and of law, no civil right was violated. (See Point VII, p. 44, *post.*)

8. The indictment contains no allegation that the acts of the defendants "were directed at the control of the market and were so widespread as substantially to affect it" (*Apex,* p. 506).

9. The indictment alleges no acts by the defendant which, by restraining "free competition in business and commercial transactions," "tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services" (*Apex,* p. 493).

10. The indictment not only does not allege that the purpose of the defendants was to exploit the public through the suppression of competition in the market or the raising of prices, but, on the contrary, it specifically alleges that "the object and purpose" of the defendants was to induce the Anheuser-Busch Company

> "to employ millwrights of United Brotherhood of Carpenters and Joiners of America, instead of machinists, to perform the work of erecting, assembling, installing and setting all machinery" (par. 28).

This purpose was not one of the purposes which the Sherman Act was enacted to penalize, and, even if it had been, it was subsequently immunized by the Clayton Act and the Norris-LaGuardia Act.

11. The sufficiency of the indictment must be judged by the facts actually alleged and not by words of opprobrium, characterization or conclusion. (See Point V, p. 56, *post.*)

POINT I

The appellant's brief devotes itself to a wholly unsuccessful effort to escape from the *Apex* decision. It is a frank and unwarranted attempt to confine that decision to merely one of the points contained therein.

(1) The appellant's brief makes almost no analytical reference to the opinion below.

The burden of the brief is the *Apex* decision by this Court, rendered after the decision below. Of the *Apex* decision the appellant's brief says (p. 40):

> "It is true that the opinion in the *Apex* case does contain language which, read apart from the background of the particular facts which the Court was considering, would militate against our position in this case."

We would have assumed that "the background of the particular facts which the Court was considering" in the *Apex* case was far more favorable to the appellant's contentions than the facts of the commonplace and peaceful walkout and proclamation of unfairness to labor set forth in this indictment.

We would have assumed that the *Apex* decision would have been acknowledged to be an authority *a fortiori*.

(2) But the appellant's brief says that the *Apex* decision is distinguishable for various alleged factual reasons, all of which we say are mistaken, illusory and irrelevant.

In the first place, the appellant's brief says (p. 16):

> "The acts charged to the defendants are not merely local activities conducted in a single factory and subject to the supervision and control of the local authorities. The indictment in this case charges rather that

> a restraint of trade has been imposed as a result of a jurisdictional dispute between two national unions and that this dispute has resulted in many different strikes in many different places which have imposed a direct and unreasonable burden upon interstate trade."

But such is not at all the accusation for which this indictment summons for trial these defendants (four individuals, not the "two national unions"). The accusation against these individuals does not begin until paragraph 24. That accusation is nothing at all factually but that these defendants (union officers) conspired to "induce and coerce" a local employer to employ members of their union in the future handling of certain local work about to become available in the employer's plant in connection with some proposed new local construction; and that to this end they participated in calling a strike at the local plant, in picketing the local premises and in urging all union members and friends of organized labor to refrain from purchasing and drinking Anheuser-Busch beer.

Each one of these acts was the traditional garden-variety of peaceful effort by a labor union to "operate for mutual help" by gaining increased employment for its members in the form of a few new local jobs in a local plant. The union was not even seeking to unionize for itself the whole plant. Nor was it seeking to intrude itself into the plant, for it was already there. It was merely seeking to defend for its members certain future work therein which it believed to belong rightfully to them and which the employer was proposing to give and ultimately did give to others.

The references in the indictment to the alleged fact that between the National Union of Carpenters and the National Union of Machinists there had been for a great many years a long standing dispute as to jurisdiction over the work of erecting and dismantling machinery, are merely historical. Certainly these four individual defend-

ants are not summoned to trial for that ancient dispute; and there is no allegation that either of the National Unions maintained its side of the dispute in bad faith or as a conspiracy, criminal or otherwise. The four defendants are accused solely of a local action in local premises except in so far as they are accused of participating in a general proclamation that in their union's opinion Anheuser-Busch was unfair to organized labor and hence its beer should not receive the patronage of the friends of organized labor.

(3) The appellant's brief also attempts to distinguish the *Apex* case by saying (p. 17):

> "In the second place, the objective of the conspiracy was not the protection and advancement of the rights of labor, such as collective bargaining, wages, hours, or working conditions; it was rather to win by force a jurisdictional dispute with another union and to deprive the members of that other union of work."

But that was the very object of the lawless and invading union in the *Apex* case! It sought by violence to obtain for its union members jobs already held by others. In the present case, the Anheuser-Busch Company on April 15, 1939, in complete disregard of the known claims of its millwrights, had undertaken to award the new work of this character in the proposed new tank building to the machinists. Hence it was the employer and the machinists who had deprived the millwrights of possible future employment—not the other way round (par. 21).

In the *Apex* case the accused union, unlike the union in the present case, was not already in the plant and was not already recognized by the employer. In the *Apex* case the employer had contracts of employment in its Philadelphia plant with "about twenty-five hundred persons," —far more than the Anheuser-Busch Company is said to have employed in its St. Louis plant. Of these twenty-five

hundred persons only eight were members of the defendant union. Nevertheless, the defendant union demanded a closed shop agreement as against all the other employees; and, when that demand was refused, it violently invaded and took possession of the plant with the aid of members of the union employed by other employers. In the present case there is no allegation that there was any invasion or seizure of property, or even that the peaceful picket line was composed of persons other than employees in the plant.

The appellant's brief claims—and this is its basic claim—that the so-called "rights of labor" are limited to "collective bargaining, wages, hours, or working conditions" (p. 17). The indictment proceeds on the same theory (pars. 23, 27). The appellant's brief refuses to acknowledge that the oldest and most traditional of "the rights of labor" is to secure and protect employment, for without employment the subsequent and consequential "rights" which the appellant's brief does acknowledge would never come into existence at all.

Our claim is that the common law, the Clayton Act, the Norris-LaGuardia Act and the Federal Constitution recognize and immunize this primary and fundamental right. (See Points III, IV and V, pp. 26, 33 and 37, *post.*)

In so far as the appellant's brief seems to believe that that kind of a labor dispute known as a "jurisdictional dispute" is outside of these common law rights and statutory immunities and is outlawed and criminal under the Sherman Law because it is a form of "competing" between unions for employment (p. 58), we will show in the succeeding Points that any such contention is contrary to the common law, contrary to the express statutory immunities, and contrary to every decision in the cases where any attempt has been made to penalize the jurisdictional strike under the Sherman Law; and is irrelevant. (See Points II and III, pp. 21 and 26, *post.*)

(4) Finally, in an effort to distinguish the *Apex* case, the appellant's brief says (p. 37):

> "In the third place, the objective of the union in this case was sought to be achieved not, as in the *Apex* case, by interfering with the business of the other party to the dispute, but by stopping interstate trade to or by four companies, with only one of which it had any relation and against none of which it had any real grievance."

This misstates both the *Apex* case and the present indictment, and is also irrelevant.

In the *Apex* case the defendant union had no "grievance" at all against the Apex Hosiery Company, for of the latter's twenty-five hundred employees only eight belonged to the defendant union. Nor in the *Apex* case did the defendant union have any dispute with the other 2,492 employees in the plant, whose jobs the invading union sought to obtain by violence; and there was no question at issue as to "the right" to perform the work which any of them were doing.

Moreover, it is not true that in the *Apex* case the defendant union was merely "interfering with the business of the other party to the dispute." This Court was at pains to explain that in point of fact:

> "The effect of the sit-down strike was to restrict substantially the interstate transportation of its [the petitioner's] manufactured product" (p. 484).

On the other hand, this indictment does not even allege that the defendants sought the discharge of anyone. The indictment itself makes clear that the dispute centered in the future doing of new work, to wit, the installing of certain machinery in the new tank building about to be constructed on the premises.

There is nothing to show that had Anheuser-Busch awarded this future work exclusively to the millwrights in-

stead of awarding it (as it did) exclusively to the machinists, it would have been obliged to have dropped any machinist already in its employ. Indeed, the indictment specifically alleges that on June 28, 1939, at about the time when the Anheuser-Busch Company let the contract for the erection of the new tank building (par. 15) and when the strike was commenced (par. 31), it already had in its employ "approximately eighty machinists" (par. 20). These machinists were, for all that appears, the ordinary number required for the ordinary work of the existing, unenlarged Anheuser-Busch plant.

Finally, it is not true that the Carpenters Union had "relation" only with the Anheuser-Busch Company—although, if true, the fact would be irrelevant.

The work of constructing the additional tank building was, by the arrangement of Anheuser-Busch, to be carried on through the Borsari Tank Corporation as its representative; and hence the employment had to be sought under or in connection with that corporation. The Gaylord Container Corporation was the lessee of office space in the building of the Anheuser-Busch Company on the very same premises (p. 16), and the Gaylord Container Corporation was proposing, through the L. O. Stocker Company, to enlarge its office space on the premises so leased (par. 18). The enlarged building would belong to the Anheuser-Busch Company. (See Point VIII, p. 48, *post*.)

Whether or not the grievance of the Carpenters and Joiners Union was a "real grievance" is even more irrelevant to the issue of the application of the Sherman Law than was the absence in the *Apex* case of any grievance at all on the part of the defendant union. But under a later Point we shall show that the grievance of these millwrights was far more "real" than the appellant's brief implies. (See Point IX, p. 52, *post*.)

(5) On the side of the law, the appellant's brief tries to confine the *Apex* case to only one of the points made in the opinion.

Again and again the brief says (pp. 18, 40, 43):

> "The test laid down in that case [Apex] is whether the restraint is 'upon commercial competition in the marketing of goods or services'."

By way of attempting to distinguish the facts of the present case, the brief then says (p. 42):

> "The effect of all these activities [by the defendants] was to impair the power of Anheuser-Busch to compete in the interstate market. The obvious purpose was to apply economic pressure to Anheuser-Busch by depriving it of the power to meet the competition of other companies engaged in the same line of business."

But, *a fortiori*, such were both the "effect" and the "purpose" in the *Apex* case. There, to quote the opinion (p. 483):

> "When the plant was seized, there were on hand 130,000 dozen pairs of finished hosiery, of a value of about $800,000, ready for shipment on unfilled orders, 80 per cent. of which were to be shipped to points outside the state. Shipment was prevented by the occupation of the factory by the strikers. Three times in the course of the strike respondents refused requests made by petitioners to be allowed to remove the merchandise for the purpose of shipment in filling the orders."

Thus, in the *Apex* case there was not merely impairment but destruction of the power of the Apex Hosiery Company "to compete in the interstate market." The intention was, by depriving it of the power to meet the competition of the market, "to apply economic pressure."

Moreover, in the *Apex* case, unlike the present case, there was a complete stoppage of *all* interstate shipment and commerce by the Apex Hosiery Company.

Furthermore, the complete stoppage of the ability of the Apex Hosiery Company to fill its huge existing orders from other states necessarily meant that those orderers would, in turn, be restrained and straitened, if not stopped, in *their* interstate commerce.

The appellant's brief attempts to make much of its utterly mistaken and irrelevant claim that the union in the present case had no grievance as regards the Gaylord Construction Company and the L. O. Stocker Company. But the defendant union in the *Apex* case had no grievance *at all* against anyone—certainly not against those buyers in other states who had placed unfilled orders for 80 per cent of the 130,000 dozen pairs of finished hosiery on hand.

(6) On November 4, 1940, the Circuit Court of Appeals for the Second Circuit, in *United States* v. *Gold, et al.*, reversed the judgment of conviction on the authority of the *Apex* decision. In interpreting the *Apex* decision the Circuit Court unanimously said:

> "That can only mean that unless the strike is so 'widespread' as to affect prices or supply, it is not 'restraint of trade', even though it is directed against the 'marketing' of goods or services."

A full statement of the facts in the *Gold* case is embodied in the opinion of the Circuit Court of Appeals, a copy of which is printed in the Appendix hereto.

POINT II

The attack by the appellant's brief upon the "jurisdictional strike," is wholly unsound and irrelevant in law. We are not here concerned with social and economic questions and reforms which lie within the jurisdiction of Congress and the States Legislatures.

If, as the brief claims, the Sherman Law applies equally to capital and labor, how can non-competition between industrial concerns be a crime under that law and yet competition between labor unions be also a crime?

(1) The appellant's brief attempts a dogma that the conceded right to strike for "unionization" of a shop or industry (—a form of strike which preeminently is one to establish jurisdiction—) does not apply where the jobs in question are sought or already held by "members of another union" (p. 58).

It seems to be the appellant's position that any peaceful attempt by the members of one union to obtain work which they think is rightfully theirs and of the class for which their union was organized and upon which its welfare depends, is legitimate where their competitors or the existing job-holders are non-union men, but it becomes illegitimate if the members of some other union seek the same work or have been successful in being the first to negotiate an exclusive contract with the employer (p. 58).

Since in the Federal field all crimes are statutory, what statutory authority is there for such arbitrary differentiations between innocence and criminality? Mere name-calling or sociologizing cannot sustain this indictment.

Are we to understand that the Attorney General takes the position that the jobs of non-union members, or their opportunities for jobs, are less precious and sacred under the law than those of union men?

Suppose the jobs in question were held by an independent "inside union" or even by a so-called "company union". Are we to understand that, in the eyes of the Attorney General, an effort by another union to secure those jobs for its own members is a crime against the anti-trust laws?

Or suppose the jobs in question were held by a C.I.O. union. Are we to understand that, in the eyes of the Attorney General, an effort by an A. F. of L. union to get those jobs for its own members would be such a crime? In other words, just where does the Attorney General propose to draw the line, and on what statutory authority would his drawing of any such line rest?

Every employment (whether of union or non-union men) necessarily rests on some contractual basis and, indeed, constitutes a contract *per se*. Hence, since the appellant's brief concedes that a union may lawfully exert economic pressure to induce or coerce termination or breach of such contracts by the employer with non-union men, the element of contract cannot be the basis of the arbitrary distinction which the appellant's brief is seeking to make as between union and non-union employers.

(2) The appellant's brief says (p. 59):

> "It is difficult to imagine any form of labor warfare so opposed to the public interest and to the interest of organized labor as the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor."

We would assume that, with the *Apex* case in mind, imagination would not have been so difficult as the brief asserts.

But is the jurisdictional dispute or strike always what the appellant's brief asserts? Is it possible to dogmatize even sociologically?

For the last eight years, without any fault of laboring men, organized or unorganized, there have been 10,000,000 to 12,000,000 people continuously out of work in this country. Their capacity to support themselves and their families is necessarily the subject of fierce competition for employment. Self-respecting laboring men prefer jobs to the dole.

We may deplore the existence of this vast, continuous and unsolved unemployment. Inevitably it sets men one against the other in the competition for jobs. But the responsibility for that condition rests elsewhere than with labor.

Every union, therefore, as long as these tragic economic conditions are unremedied, is under great and easily understandable economic pressure in the competition for jobs to secure employment for its own members and, to this end, to protect its jurisdiction over the field of work for which it was organized.

If Government and Industry have failed to remedy these basic economic conditions and compulsions, which rest more heavily on the back of labor than on any other class in the community, it would scarcely seem in order to create, through indictment, a semblance of responsibility upon the part of labor and to invoke the penal law against economic necessity. Acceptance of such extreme procedure would seem to be a confession of mental pessimism, if not bankruptcy, as regards the possibility of progress through the democratic processes of conciliation, mediation, arbitration and regulation which are already under statutory development by Congress in the labor field.

The criminal provisions of the Sherman Law were never intended to be the means of regulating all American capital and labor, and of drawing into bureaucratic supervision and control all their problems and behavior, on the theory that what is not "reasonable" is a crime.

Reform is always a laudable passion, but interpreting matters of policy in terms of criminology has all the axiomatic dangers of the hasty short-cut.

(3) Much of the difference between Fascism and Democracy lies in Government's attitude toward Labor. Fascism presupposes that centralized government must dictate administratively what activities of labor are "justified", whereas the attitude of Democracy is thus defined in the annual report of the Secretary of Labor for the fiscal year ended June 30, 1937:

> "Labor policy in a democracy is not a program conceived by a government, but rather a program which wage earners and employers must work out together in a society which develops naturally out of the work they do and the life they lead."

(23 *Corpus Juris*, p. 102, says: "The federal courts take judicial notice of the reports and official correspondence of the heads of the federal executive departments.")

The Fascist view stands for rigid regimentation and total discipline, gradually telescoping into slavery to the state autocrat. The Democratic view has faith that, while the liberty of the working man may entail certain economic frictions and conflicts, the contribution to Democracy is worth the price.

(4) The opposing brief constantly declares that "the jurisdictional strike" has been denounced by labor leaders themselves and quotes a phrase or two excised from context (p. 59). In consequence, it seems both necessary and appropriate that we should place before the Court the most recent and authoritative labor expression on the subject, to wit: that adopted and published earlier this year by the Executive Council of the American Federation of Labor, in an announcement from which we extract the following:

"The Department of Justice has embarked on a deliberate, nation-wide drive to place organized labor under the thumb of the Federal Government.

"Within the past few months the Department of Justice has obtained twelve indictments involving thirty-five unions and a large number of their officers and members.

"We charge that these prosecutions have been undertaken contrary to the plain provisions of the Clayton Act and in complete disregard of the unmistakable intent of Congress, when it adopted that law in 1914, to exempt labor organizations from the provisions of the Sherman Anti-Trust Act. * * *

"Among the legitimate activities of unions which the Department of Justice already has sought to forbid by means of prosecution under the antitrust laws is that form of union competition known as a jurisdictional dispute.

"Imagine a law which was designed to permit free competition in business being used to end competition in labor! * * *

"The American Federation of Labor deplores jurisdictional disputes as much as anyone else. They result largely from the technological displacement of workers by new inventions and new industrial techniques. The consequence frequently is bitter competition among workers and their organizations for the jobs still available.

"The American Federation of Labor settles numbers of jurisdictional disputes each year and its unions are constantly seeking amicable means of adjustments. But we have never before encountered the theory that jurisdictional disputes are illegal or that the organizations involved can be punished under the antitrust laws.

"The Executive Council serves notice that the American Federation of Labor will resist with all the power at its command the present reactionary efforts of the Department of Justice to control organized labor. * * *

"This is an issue of primary importance to every American worker and every American citizen. Once the independence of our trade unions is invaded, once

they are subjected to rigid Government control and domination, the democracy of our country is threatened and Government dictatorship will become a reality. We have seen what happened in Russia, Germany and Italy when these Governments took over control of the labor movement. We are determined not to let that happen here."

POINT III

There are multitudinous decisions holding that a jurisdictional strike is not an offense, criminal or even civil, against the Sherman Law. There is no decision to the contrary.

Although *Terrio* v. *S. N. Nielsen Const. Co.*, 30 Fed. Supp. 77, is the most recent case on the subject, the cases have been legion which have held that the acts charged are not offenses, criminal or even civil,—especially not offenses against the Sherman Law.

Levering & G. Co. v. *Morrin,* 289 U. S. 103;
United Leather Workers v. *Herkert,* 265 U. S. 457;
Senn v. *Tile Layers Union,* 301 U. S. 468;
Lauf v. *E. G. Schinner & Co.,* 303 U. S. 323;
Blankenship v. *Kurfman,* 96 Fed. (2nd) 450;
United Chain Theatres v. *Philadelphia Union,* 50 Fed. (2nd) 890;
Allen v. Flood, House of Lords 1898;
Pickett v. *Walsh,* 192 Mass. 572;
Kemp v. *Division No. 241,* 255 Ill. 213;
Exchange Bakery & Restaurant v. *Rifkin,* 245 N. Y. 260;
Stillwell Theatre, Inc. v. *Kaplan,* 259 N. Y. 405;
Nann v. *Raimist,* 255 N. Y. 306;
Bossert v. *Dhuy,* 221 N. Y. 342;

National Protective Association v. *Cummings,* 170 N. Y. 315;
Horman v. *United Mine Workers,* 166 Ark. 255;
Overland Publishing Co. v. *Union Lithograph Co.,* 57 Cal. App. 366;
Greenwood v. *Building Trades Council,* 71 Cal. App. 159;
Shaughnessy v. *Jordan,* 184 Ind. 499;
Roddy v. *United Mine Workers,* 41 Okla. 621.

In the *Terrio case, supra,* the material allegations pleaded as the basis of the conspiracy against the Sherman Law were attempts on the part of the defendants to procure, through coercing the discharge of members of the United Transport Workers, Local Industrial Union No. 806, affiliated with the C. I. O., the replacement of the said C. I. O. drivers of trucks with A. F. of L. drivers or to force the drivers of the C. I. O. union to change their affiliation and become members of the A. F. of L. It was further alleged that the defendants combined and conspired for the purpose of refusing to accept delivery of interstate material unless the same was delivered by A. F. of L. drivers. The Court, on motion to dismiss, first answered the question: "Does complainant assert a cause of action under the Sherman Antitrust Law?" It said (p. 79):

> "The next link in the conspiracy to break when the legal test is applied is that the actions of the Teamsters' Union or Building Trades' Union are alleged by complainant as acts of conspiracy in restraint of trade under the Antitrust Act. The Court considers these actions as 'lawfully carrying out the legitimate objects' of these unions.
>
> **"Such competition between labor unions is lawful, and the acts pleaded in furtherance thereof, even to the extent of threatening strikes in furtherance of such lawful object, are lawful and proper.** There can be no conspiracy to perform lawful acts in further-

ance of a lawful purpose. The allegation that A. F. of L. unions threaten to stop deliveries is tantamount to an allegation that they will engage in a peaceful strike and resort to peaceful economic pressure in furtherance of such strike, and that such activities are legal." (Emphasis ours.)

Thereupon, the Court after citing *Senn* v. *Tile Layers Union, supra* (which involved the displacement of non-union men), stated (p. 80):

> "The above principle established as between the union and the individual, not a member of a union, **applies as between the one union and the other union, or as between C. I. O. member and the A. F. of L. member."** (Emphasis ours.)

The Court then proceeded to discuss the proper means for settlement of jurisdictional disputes (p. 80):

> "Historically, in the United States, the tendency is to make it harder and harder for the activities of labor to form the basis of violation of the Anti-Trust Laws. See Clayton Act of 1914, amending the Sherman Act of 1890.
>
> "Likewise, the present prevailing tendency is to keep the inferior courts of the United States, busy as they already are, from the turmoil involved when they issue injunctive relief in connection with labor disputes. The previous procedure has not proved helpful to labor nor has it served to maintain the dignity of our over-worked federal courts. The Congress very properly created the National Labor Relations Board to act as the judicial tribunal for most all labor disputes. Its field of service is being steadily enlarged through generous decisions broadening the jurisdictional application (citing the Norris-La Guardia Act and cases).
>
> "Complainant's suit falls, therefore, in failing to state a cause of action under the Anti-Trust Laws."

In the *Blankenship* case, *supra,* 96 Fed. (2d) 450, where, in a jurisdictional dispute, one union sought an injunction against another restraining the latter from exerting labor pressure to obtain the work of the former, the Court ordered the bill of complaint dismissed, even though—

> "The obvious and sole purpose of their activities was to secure for their group the work which was being performed by the plaintiffs."

In the *Levering* case, *supra,* 289 U. S. 103, the Supreme Court of the United States found that the purpose of the conspiracy and acts committed in furtherance thereof was to compel the replacement of non-union with union workers by legitimate exertion of labor pressure. This was held to be a purely local and justifiable aim. The fact that the defendants had sought to coerce termination of the employer's contract relations with other workers did not make that aim illegitimate.

In the *Stillwell Theatre* case, *supra,* 259 N. Y. 405, the controversy was between two unions as to which was entitled to furnish the labor for the plaintiff theatres. Although the latter had a contract with the other union, the defendant union picketed the theatres, with the design of forcing them to break their contract with the other union and to employ members of the defendant union. The plaintiffs sought to have the picketing enjoined on the ground that it aimed to force a breach of their contracts with the union then employed. The Court of Appeals, in denying the injunction, said (p. 412):

> "We would be departing from established precedent if we upheld this injunction. We would thereby give to one labor union an advantage over another by prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. This might strike a death blow to legitimate labor activities. It

> is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict."

There is great significance in the fact that the *Pickett* case, *supra*, 192 Mass. 572, is the very case on which, in recommending the Clayton Act, the House Committee relied as containing the most authoritative definition of the "legitimate objects" of a labor union.

In the House Report, accompanying the proposed Clayton Act (C. Doc. 6559, 63rd Congress, 2nd Section, H. R. 2, pp. 14 *et seq.*), this *Pickett* case is cited as showing that at common law members of one union may lawfully strike to coerce an employer to give the work and jobs to them rather than to the members of another union to whom the employer had given the work and the jobs. The House Committee's report quotes at length the portions of the opinion in the *Pickett* case which we set forth below.

There would seem, therefore, to be no possibility of a contention that Congress, in passing the Clayton Act, did not expressly regard a so-called "jurisdictional strike" as one of the legitimate objects of a labor union and hence immunized by the Clayton Act.

Indeed, in referring to the *Pickett* case, the House Report said (p. 31):

> "In this connection we cite from the luminous opinion by Judge LORING delivering the opinion in *Pickett* v. *Walsh* (192 Mass. 572), a clear exposition of our views here expressed. We regret the necessity of limiting the quotation, because the whole opinion could be studied with profit."

In this *Pickett* case the plaintiffs, who were the pointers of masonry, sought to enjoin a union of bricklayers from conspiring to compel the employer to discharge them and engage instead the bricklayers' union to do certain masonry work. The Supreme Court of Massachusetts, in holding that the efforts of the defendants were, under common

and statutory law, within the *legitimate objects* of a trade union, said (the matter quoted being set forth at length in the House Committee Report as aforesaid):

> "The case is a case of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, on appeal (1892) A. C. 25.
>
> "The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay * * *. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stones unless they were given the work of pointing them when laid. See in this connection Plant *v.* Woods, 176 Mass. 492, 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Berry *v.* Donovan, 188 Mass. 353, 357, 74 N. E. 603.
>
> "The result to which that conclusion brings us in the case at bar ought not to be passed without consideration.

"The result is hard on the contractors, who prefer to give the work to the pointers, because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employee); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and, finally, (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say you must employ us for all the work or none of it. * * * They have not undertaken to forbid the contractors employing pointers, as they did in Plant *v.* Woods (176 Mass. 492). So far as the labor unions are concerned, the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor unions' acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers and masons union on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get non-union men to lay brick and stone to be pointed by the plaintiffs.

"Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by HAMMOND, *J.* in Martell *v.* White

(185 Mass. 255, 260), in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: 'Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly.'

* * * * * * *

"The application of the right of the defendant unions, who are composed of bricklayers and stone masons, to compete with the individuals plaintiffs, who can do nothing but pointing (as we have said) is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first case where the exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community."

POINT IV

The assumption in the opposing brief that Section 6 of the Clayton Act is irrelevant rests in large part upon the substitution of "reasonable" or "justified" for the word "legitimate" in the Act, and upon disregarding that the Supreme Court has defined this word "legitimate" as meaning "normal". It also disregards that portion of the section which expressly immunizes "the operation of labor organizations for the purposes of mutual help".

(1) Except for printing the Clayton Act in an Appendix and for noticing that it was mentioned by the court below (p. 2), the appellant's brief very curiously makes no mention at all of the Clayton Act. This mystifying silence on so conspicuous and relevant a statute is in strange contrast to the appellant's discursiveness on that very same statute in its brief below.

In the appellant's brief below the fulcrum of the reasoning was the statement at page 36:

> "It is difficult to imagine anything more directly in restraint of interstate commerce than an unjustified strike or boycott. If these strikes and boycotts are unjustified, clearly an unlawful restraint of that commerce exists."

And at page 102:

> "The question in each case is whether the restraint imposed by the labor organization is a reasonable one. * * * After all, 'labor' is merely a word for persons and the Sherman Act makes no distinction as to persons."

Such expressions echo the basic anti-labor arguments before the Clayton Act was passed.

As to the declaration in Section 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce," the appellant's amazing brief below said that it (p. 86)

> "cannot be said to have any definite, substantive meaning. Even though this statement was hailed by labor as making the Clayton Act 'Labor's Magna Charta,' it is clear that the members of Congress neither knew what the clause meant nor expected it to be of any great consequence."

This somewhat cynical claim that this famous phrase was but sounding brass and a tinkling cymbal for delighting and deceiving the ear of Labor is in direct contradiction of the following statement by President Roosevelt at the Texas Centennial Exposition in Dallas, Texas, on June 12, 1936:

> "The net result of monopoly, the net result of economic and financial control in the hands of the few, has in the past meant and means today, in large measure, the ownership of labor as a commodity. If

> labor is to be a commodity in the United States, in the final analysis it means that we shall become a nation of boarding houses, instead of a nation of homes. If our people ever submit to that, they will have said 'good-by' to their historic freedom. Men do not fight for boarding houses. Men do fight and will fight for homes."

(2) We do not believe that there is hidden in the Sherman Law a grant of almost unrestricted power to regulate American industry and the American working millions according to the social, economic and political views of some current official incumbent as to what activity may or may not be "justified", and to enforce and entrench that power by multitudinous indictments and the likelihood thereof. In any event, so vast an official dominion becomes a reality the moment judicial sanction is given to the immense implications inherent in the appellant's present brief and openly avowed in its brief below, to wit, that a strike is criminal (assuming that the employer's business has some elements of interstate commerce) whenever it is "unjustified", and that a labor union is a mere collection of individuals whose product (to wit, labor) is as much susceptible to the Sherman Law as any other commodity or article of commerce.

Heretofore it has always been assumed that a laboring man, whether organized or not, had the same absolute right to choose his employer and to quit his employment as has the employer to hire and fire. But now the amazing doctrine is advanced throughout the opposing brief, both explicity and implicitly, that the laboring man, when organized in association with others of his class, cannot peacefully quit his employment or boycott his employer, except at the risk that the Department of Justice, his employer or some judge or jury may declare that his action was "unjustified" and inflict a conviction or a treble damage judgment accordingly. That proposition is at the base of every argument in the opposing brief; and, we repeat, it means the end of the freedom of labor.

(3) The Courts have invariably defined the word "legitimate" in the Clayton Act as meaning "normal"—and not as meaning "justified". Thus in *Duplex Co.* v. *Deering*, 254 U. S. 443, the Court said, concerning Section 6 of the Clayton Act:

> "The section assumes the **normal** objects of the labor organization to be legitimate, and declares that nothing in the anti-trust law shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence **and operation**—to be an illegal combination or conspiracy in the restraint of trade."

We venture to believe that if the Supreme Court had held that the statutory definition of the word "legitimate", contained in Section 6 and emphasized in the Duplex case, meant "justified" and not "normal", Congress would have moved for an amendment.

The word "normal" means natural as an "operation instituted for the purposes of mutual help."

(4) The Attorney-General's brief below claimed that the dissenting opinion of Judge HOLMES in the *Bedford Company* case (274 U. S. 37) "upholds us on these points" (p. 102). But what Judge HOLMES said was (p. 65):

> "If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints on labor which remainds us of involuntary servitude."

(5) On page 87 the Attorney-General's brief below brought its ultimate objective out into the open with this statement concerning Section 6 of the Clayton Act:

> "It does not refer to the acts of labor organizations or of their members but only to the organiza-

tions and members themselves, as merely protecting them against an unlawful status."

This statement plainly overlooks or suppresses the word "operation" which clearly signifies acts, and also the words "carrying out the legitimate objects thereof" which again clearly signify acts. The consequence would be to convert the whole section into a fraud and the title of the section ("anti-trust laws not applicable to labor organizations") into a downright falsehood.

POINT V

Section 20 of the Clayton Act expressly provides that none of the acts specified therein shall "be considered or held to be violations of any law of the United States."

That section and the subsequent Norris-LaGuardia Act are also fatal to this indictment.

(1) Section 20 of the Clayton Act provides, in part:

> "That no restraining order or injunction shall be granted by any court of the United States or a judge or the judges thereof in any case between an employer and employees, or between employers and employees, *or between employees, or between persons employed and persons seeking employment*, involving, or growing out of, a dispute concerning terms or conditions of employment. * * *"

A jurisdictional dispute, such as is set forth in this indictment, falls within the very terms of this section, for several reasons:

(a) The story told in the indictment is a "dispute" or "case" between employer and employee.

(b) It is also a "dispute" or "case" between employees.

(c) It is also a "dispute" or "case" between persons employed and persons seeking employment.

(d) It concerns employment and the "terms or conditions of employment."

The millwrights, so the indictment itself says, declined to work on the premises of Anheuser-Busch except on the term and condition that they be employed to do all the work therein which they considered to be within their jurisdiction.

(2) Section 20 further provides:

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

(3) The Attorney-General in his brief below argued that Section 20 has merely to do with "procedure." This is indefensible. The last clause just quoted is a positive declaration of substantive law. It entirely defeats the pres-

ent indictment. The dispute set forth in this indictment and the specific acts alleged to have been done in the course thereof fall squarely within the definition and several "of the acts specified" in Section 20, both as to the alleged strike and as to the alleged boycott and as to the character of the dispute.

Even if the Sherman Law had ever been applicable to the facts alleged, Section 20 of the Clayton Act annuls such application.

Moreover, even disregarding this express substantive exemption, the rest of the section is a declaration not merely as to procedure, but also as to policy. It recognizes and asserts that labor disputes of the character specified are, and in the interest of the ultimate public welfare, must be outside of the competence of the courts, and should be left for adjustment and solution to methods and agencies other than those provided in the Sherman Law.

It is inconceivable that Congress would have exempted such acts from injunctive process if it intended to leave them as crimes.

(4) Moreover, in Section 2 of the Norris-LaGuardia Act (U. S. C. A., Title 29, Sec. 102), under the title "Public Policy in Labor Matters Declared", it is enacted that "the public policy of the United States" is that:

> (1) the individual worker shall have the right, through "concerted activities", "to protect his freedom of labor";
>
> (2) the individual worker shall have the right, through "concerted activities", to seek "to obtain acceptable terms and conditions of employment"; and
>
> (3) the individual worker shall have the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

This Norris-LaGuardia Act (29 U. S. C. A. §§ 101-115) is but one of the many recent statutes passed with the purpose of declaring legal the activities with which the defendants herein are charged in order to give to labor organizations the protection which they require in order to survive.

In Section 113 (c) the term "labor dispute" is defined as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*"

This Act also forbids injunctive relief, in any case "involving or growing out of any labor dispute", against the following acts among others [Sec. 104 (a) and (e)]:

> "Ceasing or refusing to perform any work or to remain in any relation of employment";
>
> "*Giving publicity* to the existence of or the facts involved in any labor dispute, whether by advertising, speaking, patroling, or by any other method not involving fraud or violence."

It is apparent from the facts alleged in the indictment herein that the acts sought to be punished arose out of a "labor dispute" within the definition of the Norris-LaGuardia Act.

In the very recent decision of this Court in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.* (decided November 18, 1940), this Court considered the effect of the Norris-LaGuardia Act as a definition of public policy and said:

> "Whether or not one agrees with the committees that the cited cases constituted an unduly restricted

interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act."

(4) This view has also been given judicial sanction in two other very recent cases. In *Donnelly Garment Co.* v. *International L. G. W. Union,* 20 Fed. Sup. 767, in discussing the effect of the Norris-LaGuardia Act on earlier interpretations of Section 20 of the Clayton Act, the Court said:

> "The broad interpretation of the phrase 'labor dispute' just suggested is required by the very language of section 13 (now section 20). If there were any doubt about it, that doubt would be removed by a consideration of the report of the Judiciary Committee of the House of Representatives submitting the bill which became the act. In that report it is said that: 'Section 13 contains definitions which speak for themselves.' It is hardly necessary to discuss them other than to say that these definitions include, as hereinabove stated, a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Press Co. *v.* Deering, *supra,* 254 U. S. 443, 41 St. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, wherein the Supreme Court reversed the Circuit Court of Appeals, 252 F. 722, and held that the inhibition of section 20 to the Clayton Act (29 U. S. C. A. § 52) only related to those occupying the position of employer or employee and no others."

And in *Grace Co.* v. *Williams,* 20 Fed. Supp. 263, the District Court for the Western District of Missouri said the same thing.

(5) The claim in the appellant's brief that the Norris-LaGuardia Act has to do only with "the equity powers of

the Federal Courts" (pp. 61-65) is clearly erroneous.

It overlooks the aforesaid express declaration in Section 2 of "the public policy of the United States" on the substantive rights of labor, and it overlooks also the inherent and implied declaration of public policy contained in the whole text and substance of the Act.

POINT VI

Another of the opposing brief's fundamental errors which organized labor must and does resist as fatal to its very existence, is its constant exclusion of the right to seek, gain and protect employment and to strike in defense thereof, from the normal and legitimate objects and operations of a labor union.

(1) This attempt by the opposing brief, and indeed by the indictment itself, reads into the Clayton Act and the Norris-LaGuardia Act a distinction and discrimination which is not there and which is contradicted by their express terms; and it seeks to subject to the stigma of the antitrust laws the most normal, primary and original of all labor's rights and objects.

Thus, in Paragraph 23 of the indictment, it is alleged that the demands of the millwrights

> "did not in any way relate to the wage rates, hours of labor, or working conditions applicable to members of the United Brotherhood of Carpenters and Joiners of America in the employ of Anheuser-Busch, Inc., but involved only the claim that millwrights who were members of United Brotherhood of Carpenters and Joiners of America had exclusive jurisdiction over and the exclusive right to perform the work of erecting, assembling, installing and setting machinery".

Apparently, it is the Attorney-General's view that the legitimate objects of labor and their permissible "opera-

tion for the purposes of mutual help" "or other mutual aid or protection" (Clayton Act, Sec. 6; Norris-LaGuardia Act, Sec. 2) do not include the right to seek, gain or defend the right to work by the same actions which they may exert in furtherance of better wage rights, hours of labor or working conditions.

The same improperly limited definition of "the rights of labor" appears repeatedly in the Attorney-General's present brief. For example, at page 17:

> "In the second place, the objective of the conspiracy was not the protection and advancement of the rights of labor, such as collective bargaining, wages, hours or working conditions."

But the right to seek, gain and protect employment is the parent of all these consequential rights, and without that primary and basic right they would never come into being or have a chance to be enjoyed.

(2) The appellant's brief seems to recognize the right of a union by strike and boycott to exert economic pressure "to bring about unionization" of a shop or industry (p. 58). But what is "unionization" except exclusive employment and jobs for the members of the striking union? And what more or worse was being done by the union mentioned in this indictment?

Indeed, in the present case, the aim was far less than the "unionization" of any shop—much less industry.

POINT VII

The indictment nowhere charges a secondary boycott. The very contrary appears.

The United Brotherhood had a perfect common law, statutory and constitutional right peacefully to endeavor to persuade its members and friends of organized labor to refrain from patronizing Anheuser-Busch beer, which was merely one of many products manufactured by the Anheuser-Busch Company.

(1) The indictment charges in paragraph 32 that the defendants

> "instigated, promoted and brought about a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States by distributing printed circulars and sending letters to local unions, councils and individual members of United Brotherhood of Carpenters and Joiners of America and of other trade and labor unions affiliated with American Federation of Labor and to members of the public at large in many of the states, and by publishing notices in 'The Carpenter' an official periodical publication of United Brotherhood of Carpenters and Joiners of America, circulated in all of the states of the United States, denouncing Anheuser-Busch, Inc., as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer, * * *." .

In other words, no more was done than is expressly permitted by Section 20 of the Clayton Act which says that, among the acts which shall not "be considered or held to be violations of any law of the United States", are:

> "ceasing to patronize or to employ any party to such (labor) dispute, or recommending, advising, or persuading others by peaceful and lawful means so to do."

And in Section 4 of the Norris-LaGuardia Act (U. S. C. A. Title 29, § 104) it is enacted that no court of the United States shall issue a temporary or permanent injunction against "doing, whether singly or in concert, any of the following acts":

> "(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patroling, or by any other method not involving fraud or violence."

(2) There is no allegation of any threats or of any violence used or offered.

It is conceded in the indictment (par. 11) that Anheuser-Busch is engaged not only in brewing beer but also in "manufacturing ice-cream cabinets, and producing other articles and commodities of commerce." There is no allegation whatever that the Union sought to persuade its members and friends of labor to refrain from patronizing any of these other articles and commodities of commerce produced by Anheuser-Busch, Inc. The attempt was aimed solely at this beer—nothing else.

The Anheuser-Busch Company is a wholesale manufacturer of beer. For the Union merely to have urged its members not to buy this beer at the plant itself would have been quite meaningless because that was not where retail purchases could or would have been made. The right to refrain from purchasing one of a number of products by a manufacturer deemed unfair to labor, and to peacefully attempt to persuade others to do likewise, is as elementary and well-settled a right of labor as the right to refuse to be employed by that manufacturer at all.

In the present case the dispute in the St. Louis plant of the Anheuser-Busch Company concerned certain work in the erection of a special tank building for the manufacture of beer; and, in consequence, it was from that Company's beer that the Union sought to persuade its members and friends of labor to withhold their patronage during the pendency of the dispute.

There is also no allegation that the "dealers" referred to in paragraph 32 did not, like the Anheuser-Busch Company itself, sell many products other than Anheuser-Busch beer. Indeed, the ordinary liquor dealer retails a large number and variety of alcoholic drinks manufactured by a large number of different brewers and distillers. There is no allegation that there was any attempt or purpose to cause the withdrawal of *all* patronage from such dealers.

We emphasize these considerations because an indictment, like all accusations or statutes imputing or defining crime, must be construed strictly, and nothing not stated can be supplied by mere inference or speculation.

(3) The opposing brief endeavors to construe paragraph 32 as if there were a period after the words "dealers in said beer throughout the United States." There is no such separation either in the thought or in the expression. Paragraph 32 is but a single sentence and expresses only a single and united thought. It describes in one breath the limited thing sought to be reduced in patronage, the limited method by which this was sought to be accomplished, the limited number of persons to whom the appeal was addressed, and the limited period during which the effort should endure.

If the draftsman of this indictment had had some other intent, he has failed to express it. He cannot now claim that something else was intended and can be spelled out by implication, ambiguity or repunctuating the sentence.

(4) The right to distribute circulars expressing an opinion and advocating acceptance of such opinion has recently been strikingly upheld by this Court in its notable opinion in *Schneider* v. *Irvington; Young* v. *California; Snyder* v. *Milwaukee;* and *Nichols* v. *Massachusetts,* 308 U. S. 147. In that case it was said (p. 161):

> "This court has characterized the freedom of speech and that of the press as fundamental personal

> rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

See, also, "Picketing, Free Speech and Labor Disputes," Contemporary Law Pamphlet, 1940, Series 1, No. 25.

The right to send out the circulars did not depend on whether the opinion expressed therein could be made good before some tribunal. The right to criticize and to express opinion is not thus limited. There is no charge that the opinion was not sincerely entertained or that the purpose was other than to exert economic pressure in the effort to secure employment. Furthermore, since the right to speak existed and was constitutional, the motive cannot be called in question by indictment.

(5) This type of temporary boycott, as alleged in the indictment, is universally regarded as a lawful means of collective labor action.

> *Duplex Printing Co.* v. *Deering,* 254 U. S. 443;
> *American Foundries* v. *Buck's Stove etc. Co.,* 33 App. Div. (N. Y.) 83, 123;
> *Gil Engraving Co.* v. *Doern,* 214 Fed. 111;
> *Rosenberg* v. *Retail Clerks' Association,* 39 Cal. 67;
> *Greenfield* v. *Central Labor Council,* 104 Ore. 259.

Thus in the *Buck's Stove* case, *supra,* where respondent a labor federation, published complainant's name in its official organ under the caption "We Do Not Patronize" and "Unfair", the Court said at page 123:

> "No one doubts, I think the right of the members of the American Federation of Labor to refuse to pat-

ronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers, not only for the use of its members, but as notice to their friends that the employers whose names appear therein are unfair to labor. This list may not only be procured and kept available for the members of the Association and its friends, but it may be published in a newspaper, or a series of newspapers. To this extent they are within their Constitutional Rights: at least, where a Court of Equity cannot intervene."

The right of a labor union to publicize its opinion that some employer is unfair to labor is one of the oldest of labor's rights; and it is done every day on the signs and placards carried by pickets and in circulars more or less generally broadcast. Indeed since the "Carpenter" was not a periodical in general circulation, the notice referred to in the indictment would not reach the attention of as many persons as the placards and publicity which at times through pickets and otherwise have been simultaneously placed around or broadcast concerning the numerous plants of some of our large industrial concerns scattered through many states.

POINT VIII

The acts of the defendants as affecting Borsari Tank Corporation, Gaylord Container Corporation and L. O. Stocker Company were not a crime under the anti-trust laws.

(1) According to the express admission of paragraph 15 of the indictment, the Borsari Tank Corporation was merely the instrumentality through which the Anheuser-Busch Company was planning to construct the additional tank building.

The future work of assembling, installing and setting the machinery in such proposed new building was work which when it came to be done would be done either for the Anheuser-Busch Company directly or for the Borsari Tank Corporation as the representative of the Anheuser-Busch Company.

According to paragraphs 21 and 31 of the indictment, the millwrights did not strike until June 28, 1939, and then only after it became plain that the Anheuser-Busch Company, by signing a year's agreement on April 15, 1939, with the machinists awarding the latter the exclusive right to do this particular class of work in the proposed new building, had irrevocably taken sides and had rendered nugatory any right or effort on the part of the millwrights to have consideration or review of their claims.

The construction contract with the Borsari Tank Corporation was not made until shortly after the strike began (par. 15).

(2) As to the Gaylord Container Corporation and the L. O. Stocker Company there was no walkout or strike at all.

There is no allegation in the indictment that on June 28, 1939, or at any time previously thereto, either of these corporations had in its employ any member of the United Brotherhood of Carpenters and Joiners of America. The indictment merely alleges a refusal to *enter* the employ of either company.

Moreover, paragraph 18 of the indictment concedes that it was not until August 1, 1939, that the Gaylord Container Corporation made its contract with the L. O. Stocker Company to construct for it an additional office building on the premises leased by it from the Anheuser-Busch Company. This date—August 1, 1939—was over a month *after* (according to par. 31) the millwrights had struck as regards the proposed additional tank building

of the Anheuser-Busch Company, the contract for which latter building had been let in July, 1939 (par. 15).

Consequently, the indictment shows that *after* the millwrights had struck as regards the proposed new tank building of the Anheuser-Busch Company and had begun picketing the premises of the Anheuser-Busch Company, the Gaylord Container Corporation with its eyes open to the situation undertook to let a contract to erect on these very premises of the Anheuser-Busch Company a new office building the fee of which would belong at once to the Anheuser-Busch Company and the possession of which would, at the expiration of the lease from the Anheuser-Busch Company (the duration of which lease is not stated), revert to that company. It is difficult to see what grievance the Gaylord Container Corporation and the L. O. Stocker Company could possibly have under these circumstances.

All that appears in the indictment is that the members of the United Brotherhood of Carpenters and Joiners of America refused to go through their own picket line and enter the picketed premises of the Anheuser-Busch Company and there assist in erecting a building which would immediately become the property of the Anheuser-Busch Company (par. 34). Thereby they merely exercised an elementary right as free men.

(3) Furthermore, there is no allegation that any employee of the Gaylord Container Corporation or of the L. O. Stocker Company quit, or walked out or struck; and there is no allegation that the defendants or anyone else asked or sought to persuade any employee of either company to quit, or walk out or strike, or asked or sought to persuade any one not a member of the Brotherhood not to enter the employ of either of these companies. There is no allegation that the defendants or anyone else refrained or sought to induce others to refrain from patronizing products or merchandise of either company; and there is

not even an allegation that there was any representation that either company was "unfair to labor."

The only charge of unfairness to labor which the indictment says was made by the Brotherhood was limited to the Anheuser-Busch Company (par. 31),—the allegation being that the picketing about the Anheuser-Busch Company premises was (par. 31):

> "by persons bearing umbrellas and charging Anheuser-Busch, Inc., to be unfair to organized labor."

There is absolute freedom in a labor union's power to set conditions for acceptance of employment in the first instance. In other words, employees have as much right to choose employers as the employers have to choose their labor.

> *Rutan Co.* v. *Labor Union No. 4*, 97 N. J. Eq. 77;
> *Barber Printing Co.* v. *Brotherhood of Painters, etc.*, 23 Fed. (2d) 743;
> *Ramsbush Decorating Co.* v. *Brotherhood of Painters*, 105 Fed. (2d) 134.

(3) Moreover, nothing could be more remote, indirect and inconsequential than the alleged effect on interstate commerce of the aforesaid refusal to work for Borsari, Gaylord and Stocker (*Industrial Association* v. *U. S.*, 268 U. S. 64, 80).

POINT IX

Moreover, quite aside from the indictment's omission to show any crime against the anti-trust laws, the indictment even fails to show that the Brotherhood was morally or legally bound to submit to the unilateral decision of the Anheuser-Busch Company awarding to the machinists by contract the exclusive right to this particular class of work at the very time when the construction contract was about to be let.

(1) The indictment admits that for years the Millwrights' Union and the Machinists' Union had had a more or less running dispute over the erection and dismantling of certain kinds of machinery (par. 19). The indictment fails to allege that the Brotherhood's long-standing claim on behalf of its millwrights had been advanced and maintained in bad faith or without color of merit, or that as to the new work of this character about to become available in this particular plant the Brotherhood did not sincerely believe itself not bound by the unilateral action of the Anheuser-Busch Company thereon.

The alleged agreement to arbitrate (par. 22) is not shown to have applied to a matter of jurisdiction, particularly over the new work and as to new jobs. Apparently the class of grievance to which the agreement applied was only such an individual grievance as could be settled by "adjustment by conference between a shop steward of the union and the foreman of the employer" (par. 22). The arbitration referred to, according to the language of the indictment, applied only to such grievances as fell within that method of adjustment but failed to be adjusted thereby. Obviously, that class of grievance and that method of adjustment could not embrace the question of jurisdiction over the new work of erecting and installing machinery in the proposed new tank building.

(2) But, however this may be and in any event, any possible use of the arbitration agreement had, just prior to the strike of the millwrights, been nullified by the unilateral action of the Anheuser-Busch Company in awarding this very work and these very jobs to the machinists by an exclusive contract.

The strike did not take place until June 28, 1939 (par. 31). The proposed new tank building had been submitted by the Anheuser-Busch Company to the Borsari Tank Corporation for a proposal as early as February, 1939 (par. 15); and on April 15, 1939, the Anheuser-Busch Company had made a written contract with the Machinists' Union for one year, which contract expressly provided that machinists should do the "erecting, assembling, installing and repairing of all metal machinery or parts thereof" (par. 21). There is no allegation that the Anheuser-Busch Company afforded the United Brotherhood of Carpenters and Joiners of America any prior opportunity to arbitrate such *ex parte* determination on its part, or even to be heard in connection with the making of it.

In other words, the making of this contract represented the voluntary action of the employer in irrevocably deciding *ex parte* and against the millwrights the whole issue as between them and the machinists, an issue of which the employer was admittedly fully aware at the time (par. 19).

Moreover, this *ex parte* making of that contract with the machinists nullified any chance whatever of thereafter having the Anheuser-Busch Company arbitrate the millwrights' claim to this new work. There is no allegation of any contemporaneous arbitration agreement between the United Brotherhood and the Machinists' Union or of any willingness on the latter's part to permit review of the exclusive contract which they had obtained. In consequence, since the Anheuser-Busch Company had by its own act put the subject outside the realm of discussion, it could not with much grace assume the role of a crybaby when the millwrights walked out.

(3) It is no answer to say that the Brotherhood on June 28, 1939, knew of the contract which on April 13, 1939, the Anheuser-Busch Company had made with the Machinists' Union, for it was the *ex parte* making of that very contract and the action of the employer in the fulfilment thereof which constituted the grievance. The agreement between the Anheuser-Busch Company and the Machinists' Union, knowledge of which is charged to the defendants, was knowingly made in violation of the very claims which the Brotherhood had consistently put forward.

(4) But, as shown by the indictment itself, not even this was the full extent of the grievance of the United Brotherhood.

Paragraph 19 alleges that on October 24th, 1932, the United Brotherhood and the Machinists' Union had signed a "tentative understanding" whereby the work of erecting and installing machinery was divided between the two unions in such wise that the jurisdiction of the former's millwrights would extend over "line shafting, pulleys and hangers, spouting and chutes, all conveyors, lifts and hoists, except that type of conveyor that is an integral part of the machine."

Paragraph 21 alleges that, notwithstanding this agreement for a specified division of the work, the machinists made on April 15, 1932 a one year contract with the Anheuser-Busch Company for the exclusive right of erecting and installing "all metal machinery or parts thereof", a contract in obvious violation of the "tentative understanding" arrived at between these two national unions in the preceding year, as alleged in paragraph 19.

In consequence, as is conceded in paragraph 18, on April 14, 1933, to wit, the day before this exclusive contract applicable to the Anheuser-Busch plant came up for renewal, the United Brotherhood served notice of its

withdrawal from the tentative understanding—evidently because of the breach thereof by the Machinists' Union and because of the desire of the United Brotherhood to be in a position to protest against the repetition of such a breach by a renewal of the aforesaid exclusive contract between the Anheuser-Busch Company and the Machinists' Union.

Nevertheless, as is conceded in paragraph 21, the Anheuser-Busch Company did immediately renew that exclusive contract on April 15, 1933 (the very day it expired) and annually thereafter again renewed it down to and including the year commencing April 15, 1939. It is evident, therefore, that for some six years the United Brotherhood was protesting the annual repetition of the renewal of this exclusive contract awarding the whole work to the machinists; and that the millwrights patiently refrained from striking, until, on June 28, 1939, it became evident that under the renewal of the said contract on April 15, 1939, the machinists were even to receive the exclusive right to all this work in the proposed new tank building.

(5) We cannot assume for a moment that this indictment is to be used from the point of view of the private interest or even the alleged rights of Anheuser-Busch; or that Anheuser-Busch can, by making a unilateral decision in favor of the machinists, suddenly turn into a crime the United Brotherhood's continued insistence on the jurisdiction which it has always claimed for its millwrights. Otherwise, the unilateral decision of Anheuser-Busch would become part of the penal law of the United States of America.

POINT X

The opposing brief overlooks altogether the familiar rules applicable to the construction of an indictment.

These rules are:

1. Since the Sherman Law is generic in its language, mere repetition of the language of the statute is not sufficient, but facts constituting the offense must be alleged.

In re Greene, 52 Fed. 104;
U. S. v. *Nelson,* 52 Fed. 646;
U. S. v. *Patterson,* 55 Fed. 605;
U. S. v. *Winslow,* 195 Fed. 578 (aff'd. 227 U. S. 202);
U. S. v. *Cowell,* 243 Fed. 730;
U. S. v. *Cruikshank,* 92 U. S. 542;
Batchelor v. *U. S.,* 156 U. S. 426;
U. S. v. *Hess,* 124 U. S. 483;
U. S. v. *Britton,* 107 U. S. 655;
Donegan v. *U. S.,* 296 Fed. 843;
Middlebrooks v. *U. S.,* 23 Fed. (2d) 244.

2. The sufficiency of the indictment must be judged exclusively from the facts alleged and not from the conclusions, characterizations and epithets of the pleader. (*U. S.* v. *Cruikshank,* 92 U. S. 543; *Batchelor* v. *U. S.,* 156 U. S. 426.)

3. An indictment must be construed strictly, to wit, against the pleader. (31 *Corpus Juris,* Sec. 186, p. 667.)

4. All the material facts and circumstances embraced in the definition of the offense must be stated, or the in-

dictment will be defective. (*U. S.* v. *Hess,* 124 U. S. 483, 486.)

5. Any omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital. (*U. S.* v. *Hess,* 124 U. S. 483, 486; *Asgill* v. *U. S.,* 60 Fed. (2) 780.)

6. An inadequate statement of facts cannot be cured by invective or characterization. (*Middlebrooks* v. *U. S.,* 23 F. (2d) 244; *U. S.* v. *Fuselier,* 46 F. (2d) 568.)

CONCLUSION

The decision of the court below should be affirmed.

Dated, December 4, 1940.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

Decided 11/4/40

UNITED STATES,
Appellee,

v.

BENJAMIN GOLD, and others,
Appellants.

Appeals from judgments of conviction of the District Court for the Southern District of New York for a conspiracy under the Sherman Act.

Before—L. HAND, SWAN and AUGUSTUS N. HAND,
Circuit Judges.

KENNETH E. WALSER for the appellants;
BERKELEY W. HENDERSON for the appellee.

L. HAND, *C. J.*:

These appeals are from judgments of conviction of the accused for a conspiracy to restrain trade in violation of the Sherman Act. The only question we shall consider is whether the evidence supports the verdict, the facts which the jury might have found to be proved being as follows: About ninety per cent. of the manufacturers of fur garments in the United States do their business in the City of New York, buying the raw skins from dealers who have imported them from foreign countries and other states.

Appendix

The first process of manufacture is dressing and dyeing which the manufacturer ordinarily does not do himself; he contracts for this service with dressers and dyers who have their own factories and employ their own workmen and most of whom are in New Jersey. Thus skins must cross the state line twice before they return to the manufacturers to be cut and sewn. At the time of the conspiracy, the year 1932, the Needle Trades Workers' Industrial Union, a large nation-wide union had established itself in the fur business in New York, though its hold there was as yet small. Most of the business had already been unionized by the International Fur Workers, another large union; the rest was not unionized at all. The Needle Workers started a campaign to bring the whole industry within their union, including not only employees of the manufacturers but of the dressers and dyers as well. Among the dressers and dyers were three large firms in Newark, New Jersey: A. Hollander and Son, Joseph Hollander, Inc., and Philip A. Singer & Brother. All of these operated non-union plants, and the officers of the Needle Workers—the accused at bar—directed their main attack against them, striving to compel them to employ only the union's own members. The means they used to accomplish this were in general to picket the factories and persuade employees to join the union, to warn the New York manufacturers not to send their skins to them to be dressed and dyed and to direct their own members in the New York manufacturers' plants to refuse to work up any skins dressed and dyed by the offending three firms. There was abundant evidence from which a jury could find that this three-fold attack was carried out with utter lawlessness and violence; and there can be no question that if the strikes did in fact restrain trade within the meaning of the Sherman Act, the restraints used were "unreasonable" to the last degree.

The case was tried before the decision of the Supreme Court in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, before which it had been quite commonly supposed that the Sherman Act covered, not only concerted action intended to control prices or supply, or resulting in such control, but generally all action which so far affected interstate commerce as to be within the constitutional power of Congress at all; that is, that Congress in the Sherman Act had meant to exercise its power as broadly as possible. This view the court repudiated in the *Apex* case. Its reasoning was that the act had been passed only to implement the common law as to restraints of trade; and that, although it imposed its own liabilities, civil and criminal, besides providing remedies for their breach, nevertheless it took the common law as its model, creating federal rights and duties fashioned after existing precedents. So much the court had often said before, and the new contribution was that, turning to those precedents, it now held that the only restraints forbidden were those which limited competition in "business and commercial transactions," and which "tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services," p. 493. These were no chance words; they were the burden of the reasoning by which the court affirmed a reversal by the circuit court of appeals. For example, the contracts must be "for the restriction or suppression of competition in the market, agreement to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or customers the advantages which accrue to them from free competition in the market" (p. 497). Again, "restraints upon competition have been condemned only when their purpose or effect was to raise or

fix the market price'' (p. 500). See also pp. 501, 507, 512. Mere restraints upon transportation of goods across state lines were therefore not enough; they must be in execution of a plan to restrict market competition, or that must be their necessary result. Furthermore, the argument was necessary to the decision because not only had the ''sit-down'' strikers entirely stopped the manufacture of goods, 80 per cent of which would have gone into interstate commerce; but their leader expressly refused to allow any finished goods—of which there was a large amount on hand—to leave the factory. It was a complete answer to these wrongs—which the court condemned without stint—that the plaintiff had not shown that the strike had had any substantial commercial effect upon either the prices at which the goods were sold or the supply upon the market, and that they had not prejudiced consumers in any other way.

So far as concerns the skins themselves, the case at bar is even weaker; for, although the accused tried to stop any raw skins from crossing from New York to New Jersey to be dressed and dyed by the Hollanders and Singer and from returning to New York to be cut and sewn, they did not by so doing interfere with marketing of any kind. Dressing, dyeing, cutting and sewing are all processes in the manufacture of garments; the skins were not sold to the dressers and dyers, nor were they resold by them to the manufacturers, moreover, so far as appears, the price and supply of the resulting garments were not in fact affected by the strike. We may assume *arguendo* that, if the dealers had sent the skins to the dressers and dyers and sold them to the manufacturers from the dressing and dyeing plants, a combined refusal to work up such skins—if ''widespread'' enough to affect prices or supply—would have been in ''restraint of trade''; but there is no evidence in the record that any part of the business was done in that way.

Nevertheless, there may be a restraint of trade in services as well as in goods, and the argument we have just made will not hold as to the service of dressing and dyeing. We must not indeed confuse the services to their employers of the employees of the Hollanders and Singer with the services of the Hollanders and Singer to the manufacturers. There can be no question that the accused intended to acquire a monopoly of the whole supply of the services rendered by the employees; that is indeed the object of most unions. But the court in the *Apex* case expressly declared that the Sherman Act did not cover any restraint of competition in such services (pp. 502, 503) and we must therefore disregard any effect upon them which the accused may have intended or caused. Coming then to the service of the dressers and dyers, they picked up the skins in New York, dressed and dyed them in New Jersey and returned them to the manufacturers in New York; and, as all this was done by a single contract, they must be held to have sold to the manufacturers a service in substantial measure interstate. The accused therefore restrained the "marketing" of an interstate service, as they did not restrain the "marketing" of the skins themselves. It is true that their purpose was not to control prices or supply; they were indifferent to these except as a sanction for bending the three obdurate firms to their will. But purpose is never an excuse in these cases; only the intent of the accused, or the necessary result of his conduct, counts, and it would appear enough that here they intended to stop all "marketing" of service. So far, therefore, the case at bar is on all fours with a number of earlier decisions, except that they dealt with goods instead of services. *Loewe* v. *Lawlor*, 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S.

295; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association,* 274 U. S. 37. Nevertheless there was one element lacking which was present in the decisions just cited, and which the court thought crucial in the *Apex* case. Although the accused at bar intended to stop the marketing of the services of the three recalcitrant firms, the operations of those firms were not shown to have been upon a large enough scale to make their cessation affect market conditions in New York. That that is now an essential element appears from the following extract out of the opinion in the *Apex* case: "It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at the control of the market and were so widespread as substantially to affect it" (p. 506). That can only mean that unless the strike is so "widespread" as to affect prices or supply, it is not "restraint of trade", even though it is directed against the "marketing" of goods or services. It is certainly not for us to say how far the four decisions cited lend themselves to such a distinction; the court itself was not unanimous upon the point. We have only to follow the decision made.

Convictions reversed.

BLANK PAGE

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO.

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1940.

United States of America, Appellant, *vs.* William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein.	Appeal from the District Court of the United States for the Eastern District of Missouri.

[February 3, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. § 1, is the question. It is sharply presented in this case because it arises in a criminal prosecution. Concededly an injunction either at the suit of the Government or of the employer could not issue.

Summarizing the long indictment, these are the facts. Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. The Gaylord Container Corporation, a lessee of adjacent property from Anheuser-Busch, made a similar contract for a new building with the Stocker Company. Anheuser-Busch obtained the materials for its brewing and other operations and sold its finished products largely through interstate shipments. The Gaylord Corporation was equally dependent on interstate commerce for marketing its goods, as were the construction companies for their building materials. Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters

agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch and its tenant, and a request through circular letters and the official publication of the Carpenters that union members and their friends refrain from buying Anheuser-Busch beer.

These activities on behalf of the Carpenters formed the charge of the indictment as a criminal combination and conspiracy in violation of the Sherman Law. Demurrers denying that what was charged constituted a violation of the laws of the United States were sustained (32 F. Supp. 600) and the case came here under the Criminal Appeals Act. Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682; Judicial Code § 238, 28 U. S. C. § 345.

In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams* v. *United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court.

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. Act of October 15, 1914, 38 Stat. 730. "This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the posi-

tion of workingmen and employer as industrial combatants." *Duplex Co.* v. *Deering*, 254 U. S. 443, 484. Section 20 of that Act, which is set out in the margin in full,[1] withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States". The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of § 20 to trade union activities directed against an employer by his own employees. *Duplex Co.* v. *Deering*, *supra*. Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. *Ibid.*, p. 485-486. Agitation again led to legislation

[1] 38 Stat. 738, 29 U. S. C. § 52: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

and in 1932 Congress wrote the Norris-LaGuardia Act. Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. §§ 101-115.

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict,[2] and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States". So long as a union acts in its self-interest and does not combine with non-labor groups,[3] the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a

2 "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

3 Cf. United States *v.* Brims, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters.

controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made § 20 inapplicable to trade union conduct resulting from them.

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by § 20 for "terminating any relation of employment", or "ceasing to perform any work or labor", or "recommending, advising, or persuading others by peaceful means so to do". The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working". Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize .. . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do".

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co.* v. *Deering* gave to the immunities of § 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. —. This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. *New Negro Alliance* v. *Grocery Company*, 303 U. S. 552, 562; see *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 507, n. 26. Such a dispute, § 13(c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee".[4] And under § 13(b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation".

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is

[4] Three years later, in the National Labor Relations Act, Congress gave similar breadth to the definition of a labor dispute. Act of July 3, 1935, 49 Stat. 448, 450, 29 U. S. C. § 152(9).

not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that enduces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 Fed. 30, 32.

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co.* v. *Deering, supra,* and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association,* 274 U. S. 37, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by

infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States", including the Sherman Law.

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act in so far as "any law of the United States" is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.

Affirmed.

Mr. Justice MURPHY took no part in the disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1940.

The United States of America, Appellant, *vs.* William L. Hutcheson, George Casper Ottens, John A. Callahan, and Joseph August Klein.	Appeal from the District Court of the United States for the Eastern District of Missouri.

[February 3, 1941.]

Mr. Justice Stone, concurring.

As I think it clear that the indictment fails to charge an offense under the Sherman Act, as it has been interpreted and applied by this Court, I find no occasion to consider the impact of the Norris-LaGuardia Act on the definition of participants in a labor dispute in the Clayton Act, as construed by this Court in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443—an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge.

The indictment is for a conspiracy to promote by peaceful means a local "jurisdictional" strike in St. Louis, Missouri. Its aim is to determine whether the United Brotherhood of Carpenters or the International Association of Machinists, both labor organizations affiliated with the American Federation of Labor, shall be permitted to install certain machinery on the premises of Anheuser-Busch, Inc. in St. Louis. It appears that Anheuser-Busch brews beer and manufactures other products which it ships to points outside the state. It also uses supplies and building materials which are shipped to it from points outside the state. Borsari Tank Corporation is about to construct for Anheuser-Busch upon its premises a building for its use in brewing beer. L. O. Stocker Company has contracted and intends to construct an office building upon land of Anheuser-Busch adjacent to its brewery and leased by it to the Gaylord Container Corporation, a manufacturer of paper and cardboard containers which it ships in interstate commerce. It is alleged that both Borsari and Stocker will require and use in the construction of

the buildings, materials to be shipped from points outside the state to the building sites on or adjacent to the Anheuser-Busch premises.

The indictment charges that pursuant to the conspiracy to enforce the jurisdictional demands appellees, who are officers or representatives of the Brotherhood, called a strike of its members, some seventy-eight in number, in the employ of Anheuser-Busch, attempted to call sympathy strikes by members of other unions in its employ and caused the premises of Anheuser-Busch and the adjacent premises leased to Gaylord to be picketed by persons "bearing umbrellas and charging Anheuser-Busch, Inc. to be unfair to organized labor; with the intent to shut down the brewery and manufacturing plant of Anheuser-Busch, Inc., to hinder and prevent the passage of persons and property to and from said premises and thus to restrain and stop the commerce of Anheuser-Busch" in the beer and other products manufactured by it, and in the supplies and materials procured by it extrastate, and "to restrain the commerce" of Gaylord. It is alleged that pursuant to the conspiracy, defendants "refused to permit members of the United Brotherhood . . . to be employed and prevented such members from being employed by Borsari . . . with the intent and effect of preventing construction of the building about to be built by Borsari . . . and thus of restraining the commerce of Anheuser-Busch in beer . . . and also with the knowledge and willful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used by Borsari". Like allegations are made with respect to Stocker with the added charge that the acts alleged were with intent to prevent performance of Stocker's contract with Gaylord "with willful disregard of the consequent restraint of the commerce of Gaylord".

There is the further allegation that pursuant to the conspiracy defendants and their co-conspirators have instigated and brought about a "boycott of beer brewed by Anheuser-Busch . . . and of dealers in said beer throughout the United States", by distributing to members of labor organizations and to the public at large in many states and by published notices circulated interstate "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer".

We are concerned with the alleged activities of defendants, actual or intended, only so far as they have an effect on commerce pro-

hibited by the Sherman Act as it has been amended or restricted in its operation by the Clayton Act. The legality of the alleged restraint under the Sherman Act is not affected by characterizing the strike, as this indictment does, as "jurisdictional" or as not within the "legitimate object of a labor union". The restraints charged are of two types: One is that resulting to the commerce of Anheuser-Busch, Borsari, Stocker and Gaylord from the peaceful picketing of the Anheuser-Busch premises, a part of which is leased to Gaylord, and the refusal of the Brotherhood to permit its members to work, and its prevention of its members from working (by what means other than picketing does not appear) for Borsari and Stocker. The other is that resulting from the requests addressed to the public to refrain from purchasing Anheuser-Busch beer.

It is plain that the first type of restraint is only that which is incidental to the conduct of a local strike and which results from closing the plant of a manufacturer or builder who ships his product in interstate commerce, or who procures his supplies from points outside the state. Such restraints, incident to such a strike, upon the interstate transportation of the products or supplies has been repeatedly held by this Court, without a dissenting voice, not to be within the reach of the Sherman Anti-Trust Act. There is here no allegation in the case of any of the employers of any interference, actual or intended, by strikers with goods moving or about to be shipped in interstate commerce such as was last term so sharply presented and held not to be a violation of the Sherman Act in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469.

With respect to Borsari and Stocker the indictment does no more than charge a local strike to enforce the jurisdictional demands upon Anheuser-Busch by the refusal of union members to work in the construction of buildings for Anheuser-Busch or upon its land, the work upon which, so far as appears, has not even begun. The restraint alleged is only that resulting from the "disregard" by the strikers of the stoppage of the movement interstate of the building materials and the manufactured products of Gaylor consequent upon their refusal to construct the buildings. Precisely as in *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, where a local building strike with like consequences was held not to violate the Sherman law, there is wanting here any fact to show that the conspiracy

was directed at the use of any particular building material in the states of origin and destination or its transportation between them "with the design of narrowing or suppressing the interstate market", each of which were thought to be crucial in *Bedford Co.* v. *Stone Cutters Ass'n*, 274 U. S. 37, 46-47. See *Apex Hosiery Co.* v. *Leader, supra*, 506.

As to the commerce of Anheuser-Busch and Gaylord, the indictment at most shows a conspiracy to picket peacefully their premises and publicly to charge the former with being unfair to organized labor, all with the intent to shut down the plant of Anheuser-Busch and to hinder and prevent the passage of persons and property to and from the premises and thus to restrain the commerce of Anheuser-Busch and Gaylord. There is also the allegation already noted that the refusal to work for Stocker will restrain the commerce of Gaylord, presumably because he will manufacture and ship less of his product if the proposed building is not completed.

It is a novel proposition that allegations of local peaceful picketing of a manufacturing plant to enforce union demands concerning terms of employment accompanied by announcements that the employer is unfair to organized labor is a violation of the Sherman Act whatever effect on interstate commerce may be intended to follow from the acts done. They, like the allegations here, show only such effect upon interstate commerce as may be inferred from the acts alleged and in any event such restraint as there may be is not shown to be more than that which is incidental to every strike causing a shutdown of a manufacturing plant whose product moves in interstate commerce or stopping building operations where the builder is using materials shipped to him in interstate commerce. If the counts of the indictment which we are now considering make out an offense, then every local strike aimed at closing a shop whose products or supplies move in interstate commerce is, without more, a violation of the Sherman Act. They present a weaker case than those unanimously held by this Court not to involve violation of the Sherman Act in *United Mine Workers* v. *Coronado Coal Co.* (First Coronado Case), 259 U. S. 344; *United Leather Workers* v. *Herkert*, 265 U. S. 457; *Levering & Garrigues Co.* v. *Morrin, supra*, and see *Coronado Coal Co.* v. *United Mine Workers* (Second Coronado Case), 268 U. S. 295, 310. In any case there is no allegation in the indictment

that the restraint did or could operate to suppress competition in the market of any product and so dismissal of these counts is required by our decision in *Apex Hosiery Co.* v. *Leader, supra.*

The second and only other type of restraint upon interstate commerce charged is the so-called "boycott" alleged to be by the publication of notices charging Anheuser-Busch with being unfair to labor and requesting members of the Union and the public not to purchase or use the Anheuser-Busch product. Were it necessary to a decision I should have thought that, since the strike against Anheuser-Busch was by its employees and there is no intimation that there is any strike against the distributors of the beer, that the strike was a labor dispute between employer and employees within the labor provisions of the Clayton Act as they were construed in *Duplex Printing Press Co.* v. *Deering, supra.* In that case § 20 of the Act, as the opinion of the Court points out, makes lawful the action of any person[1] "ceasing to patronize . . . any party to such dispute" or "recommending, advising or persuading others by peaceful and lawful means so to do."

Be that as it may, it is a sufficient answer to the asserted violation of the Sherman Act by the publication of such notices and requests, to point out that the strike was by employees of Anheuser-Busch; that there was no boycott of or strike against any purchaser of Anheuser-Busch beer by any concerted action or refusal to patronize him by the purchase of beer or other products supplied by him such as was condemned in *Loewe* v. *Lawlor,* 208 U. S. 274, 300-307; cf. *Apex Hosiery Co.* v. *Leader, supra,* 505; and finally that the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress. See *Thornhill* v. *Alabama,* 310 U. S. 88.

I can only conclude that, upon principles hitherto recognized and established by the decisions of this Court, the indictment charges no violation of the Sherman Act.

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[1] Appellees, being national and local officers of the Brotherhood and representing the employees in the labor dispute with their employer, are "proximately and substantially concerned" as parties to an actual dispute and are, therefore, entitled to the benefits of the Clayton Act. See Duplex Printing Press, Co. *v.* Deering, supra, 470, 471.

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1940.

The United States of America, Appellant, *vs.* William L. Hutcheson, George Casper Ottens, John A. Callahan and Joseph August Klein.	Appeal from the District Court of the United States for the Eastern District of Missouri.

[February 3, 1941.]

Mr. Justice Roberts.

I am of opinion that the judgment should be reversed.

The indictment adequately charges a conspiracy to restrain trade and commerce with the specific purpose of preventing Anheuser-Busch from receiving in interstate commerce commodities and materials intended for use in its plant; of preventing the Borsari Corporation from obtaining materials in interstate commerce for use in performing a contract for Anheuser-Busch, and of preventing the Stocker Company from receiving materials in like manner for the construction of a building for the Gaylord Corporation. The indictment further charges that the conspiracy was to restrain interstate commerce flowing from Missouri into other states of products of Anheuser-Busch and generally to restrain the interstate trade and commerce of the three corporations named.[1]

Without detailing the allegations of the indictment, it is sufficient to say that they undeniably charge a secondary boycott, affecting interstate commerce.

This court, and many state tribunals, over a long period of years, have held such a secondary boycott illegal. In 1908 this court held such a secondary boycott, instigated to enforce the demands of a labor union against an employer, was a violation of the Sherman Act and could be restrained at the suit of the employer.[2] It is matter of history that labor unions insisted they were not within the purview of the Sherman Act but this court held to the contrary.

1 C. E. Stevens Co. *v.* Foster & Kleiser Co., No. 41, Oct. T. 1940.

2 Loewe *v.* Lawlor, 208 U. S. 274.

As a result of continual agitation the Clayton Act was adopted. That Act, as amended, became effective October 15, 1914.[3] Subsequently suits in equity were brought to restrain secondary boycotts similar to those involved in earlier cases. The contention was made that the Clayton Act exempted labor organizations from such suits. That contention was not sustained.[4] Upon the fullest consideration, this court reached the conclusion that the provisions of Section 20 of the Clayton Act governed not the substantive rights of persons and organizations but merely regulated the practice according to which, and the conditions under which, equitable relief might be granted in suits of this character. Section 6 has no bearing on the offense charged in this case.

This court also unanimously held that a conspiracy such as is charged in the instant case renders the conspirators liable to criminal prosecution by the United States under the anti-trust acts.[5]

It is common knowledge that the agitation for complete exemption of labor unions from the provisions of the anti-trust laws persisted. Instead of granting the complete exemption desired, Congress adopted, March 23, 1932, the Norris-LaGuardia Act.[6] The title and the contents of that Act, as well as its legislative history,[7] demonstrate beyond question that its purpose was to define and to limit the jurisdiction of federal courts sitting in equity. The Act broadens the scope of labor disputes as theretofore understood, that is, disputes between an employer and his employes with respect to wages, hours, and working conditions, and provides that before a federal court can enter an injunction to restrain illegal acts certain preliminary findings, based on evidence, must be made. The Act further deprives the courts of the right to issue an injunction against the doing of certain acts by labor organizations or their members. It is unnecessary to detail the acts as to which the jurisdiction of a court of equity is abolished. It is sufficient to say, what a reading of the Act makes letter clear, that the jurisdiction of actions for damages authorized by the Sherman Act, and of the

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3 c. 323, 38 Stat. 730.

4 Duplex Printing Press Co. *v.* Deering, 254 U. S. 443; Bedford Cut Stone Co. *v.* Journeymen Stone Cutters Association, 274 U. S. 37.

5 United States *v.* Brims, 272 U. S. 549.

6 c. 90, 47 Stat. 70; 29 U. S. C. §§ 101-115.

7 S. Rep. No. 163, 72d Cong., 1st Sess., pp. 7-8; H. Rep. No. 669, 72d Cong., 1st Sess., pp. 2-3; 75 Cong. Rec. 5464, 5467.

criminal offenses denounced by that Act, are not touched by the Norris-LaGuardia Act.

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.[8]

The construction of the act now adopted is the more clearly inadmissible when we remember that the scope of proposed amendments and repeals of the anti-trust laws in respect of labor organizations has been the subject of constant controversy and consideration in Congress. In the light of this history, to attribute to Congress an intent to repeal legislation which has had a definite and well understood scope and effect for decades past, by resurrecting a rejected construction of the Clayton Act and extending a policy strictly limited by the Congress itself in the Norris-LaGuardia Act, seems to me a usurpation by the courts of the function of the Congress not only novel but fraught, as well, with the most serious dangers to our constitutional system of division of powers.

The CHIEF Justice joins in this opinion.

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[8] The rule always heretofore followed in respect of implied repeal was recently expounded in an analogous situation in United States *v.* Borden Co., 308 U. S. 188, 198.